Comments of the

RUBBER MANUFACTURERS ASSOCIATION

On

Notice of Proposed Rulemaking

Confidential Business Information

National Highway Traffic Safety Administration

U.S. Department of Transportation

Docket No. NHTSA-02-12150

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On behalf of its tire manufacturer members, the Rubber Manufacturers Association ("RMA")[1] submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") on Confidential Business Information issued by the National Highway Traffic Safety Administration ("NHTSA" or "Agency") on April 30, 2002. 67 Federal Register 21198- 21206.

RMA has focused its comments on the proposed revisions to 49 C.F.R. Part 512 that address the treatment of the early warning information the Agency will collect under regulations promulgated under a provision of the Transportation Recall Enhancement, Accountability and Documentation Act ("TREAD Act") (S*ee 49 U.S.C. §30166(m)(3)(A*)) and other tire-related information that the industry has historically provided to NHTSA. The TREAD Act requires that early warning information not be released until such time as a special defect or noncompliance investigation docket has been established and the Secretary has made the findings required by the Act. [2]

Because RMA's comments are also germane to the pending early warning reporting rulemaking, Docket No. NHTSA 2001 8677, we are also submitting these comments to that docket. NHTSA has already suggested that an additional comment period may be warranted, see 67 FR 21200, col. 3. RMA requests that NHTSA issue a Supplemental Notice of Proposed Rulemaking to obtain comments on the specific reporting elements that will be required by the final Early Warning Rule. The Supplemental Notice will also provide the opportunity for NHTSA to respond to the substantive and procedural issues raised in these comments. Since the TREAD Act did not establish a requirement or deadline for this rulemaking, NHTSA should allow for a thorough ventilation of all of these issues.

I. DISCLOSURE OF EARLY WARNING DATA IS CONTRARY TO LAW

A. THE TREAD ACT PROHIBITS NHTSA FROM AUTOMATICALLY DISCLOSING EARLY WARNING DATA

NHTSA's routine disclosure of early warning data is expressly prohibited by the TREAD Act. In drafting the TREAD Act, Congress was aware that the information subject to the new early warning reporting regulations mandated by Section 3(b) of the Act was competitively sensitive and accordingly entitled to protection from disclosure, except in certain, limited circumstances. Thus, Section 3(b) of the TREAD Act therefore includes the following provision:

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[1] The Rubber Manufacturers Association ("RMA") is the leading national trade association representing the interests of tire and rubber manufacturers in the United States. RMA's membership includes all of the country's major tire manufacturers: Bridgestone/Firestone Americas Holding, L.L.C., Continental Tire N.A., Inc., Cooper Tire & Rubber Company, The Goodyear Tire & Rubber Company, Michelin North America, Inc., Pirelli Tire North America, and Yokohama Tire Corporation.

[2] Since NHTSA has expressed a willingness to accept tire-related early warning information from non-tire manufacturers, RMA's comments in this rulemaking apply to all tire-related early warning information submitted to the Agency regardless of the source of that information.

> *None of the information collected pursuant to the final rule promulgated under paragraph (1) shall be disclosed pursuant to section 30167 (b) unless the Secretary determines the disclosure of such information will assist in carrying out sections 30117(b) and 30118 through 30121. 49 U.S.C. §30166(m)(4)(C) ("paragraph (4)(C")(emphasis added).*

The above provision prohibits disclosure "unless" the Secretary makes certain other determinations pursuant to NHTSA's existing authority under several provisions of the National Traffic and Motor Vehicle Safety Act ("Safety Act"). Section 30167(b) is designed to address situations arising from a special defect or noncompliance involving an identified vehicle or item of motor vehicle equipment. Section 30117(b) pertains to the records to be maintained by covered manufacturers concerning the identities of first purchasers of their products and Sections 30118 through 30121 pertain to the notification of defect and non-compliance by either the Secretary or by covered manufacturers. Paragraph (4) (C) therefore explicitly precludes NHTSA from automatically disclosing early warning information to third parties unless the Secretary determines, on a case-by-case basis that:

(1) The disclosure would assist in ensuring that manufacturers maintain proper records regarding the first purchasers of their products; or

(2) The disclosure would assist in notifying the public of defect or non-compliance investigations conducted by the Agency and the availability of consumer remedies.

Based on the plain meaning of this statutory provision, NHTSA has no legal authority to disclose industry-wide early warning data.[3] The Agency therefore must exclude early warning data from the provisions of 49 C.F.R. Part 512. In addition, the Agency should add a separate provision in the final early warning reporting regulations specifically prohibiting the disclosure of early warning data except under the circumstances expressly delineated in paragraph (4)(C).

B. EARLY WARNING DATA IS NOT SUBJECT TO DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT

Exemption 3 of the Freedom of Information Act (FOIA) exempts from disclosure information that is "specifically exempted from disclosure by statute (other than 552b of this title) provided that such statute (A) requires the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." Paragraph (4) (C) falls under clause (B), in that disclosure of any early warning information is prohibited unless the Secretary makes a determination that disclosure will assist in carrying out a defect or noncompliance investigation or in implementing a remedy following such an investigation. The discretion of disclosure afforded

[3] If NHTSA enacts a rule providing for disclosure of this data, the Agency will violate the Administrative Procedure Act, which requires final agency rules to be set aside if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. 706(2)(A).

NHTSA under the TREAD Act is sufficiently circumscribed to trigger the (B)(3) exemption of the FOIA. *See, e.g., Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 122 (1980); *National Western Life Insurance v. United States*, 512 F. Supp. 454, 459 (N.D. Texas, 1980).

In GTE Sylvania, the Supreme Court found section 6(b)(1) of the Consumer Product Safety Act, was sufficient to satisfy 5 U.S.C.§ 552(b)(3)(B). That statute prohibited the Consumer Product Safety Commission from disclosing any information to the public unless it first "'take[s] reasonable steps to assure' (1) that the information is 'accurate', (2) that disclosure will be 'fair in the circumstances,' and (3) the disclosures will be 'reasonably related to effectuating the purposes of [the Act].'" The Court found that the statute "does not grant the Commission broad discretion to refuse to comply with FOIA requests" but rather "sets forth sufficiently definite standards to fall within the scope of Exemption 3". *Id.*

The Court in National Western Life Insurance v. United States, 512 F. Supp. 454, 459 (N.D. Texas, 1980) explained the standard a collateral withholding statute must meet to satisfy the requirements of 5 U.S.C. § 552(b)(3)(B):

> For a statute to be countenanced by Section 552(b)(3)(B) and thus afford an exemption to required disclosure, it must provide a measurable yardstick for the Agency to use in determining whether disclosure is permissible.

The Court went on to find that the "[good business practice] standard involved in the postal statute at issue may not be specifically quantifiable, yet is not so vague as to leave a Postmaster General with unfettered discretion as to what information may be withheld from disclosure." *Id*.

Similarly, paragraph (4) (C) provides sufficiently clear guidance regarding disclosure to fall within Clause B of exemption 3. By the TREAD Act's express language, early warning information is not subject to disclosure unless the Secretary makes a determination that disclosure will serve a specific purpose relating to situations where a defect or noncompliance investigation has been opened.

C. THE STRUCTURE AND THE LEGISLATIVE HISTORY OF THE TREAD ACT SUPPORT THE RMA'S READING OF THE ACT

Congressional intent clearly demonstrates that the plain reading of the statute is correct; disclosure of early warning data is prohibited. The early warning reporting statutory provisions provide evidence of the disclosure-restricting intent behind the TREAD Act. Section 30166(m) *Early Warning Reporting Requirements* is divided into five subsections:

(1) Rulemaking required;
(2) Deadline;
(3) Reporting Elements;
(4) Handling and utilization of reporting elements; and
(5) Periodic review.

Subsection (4); in turn, has four subparts. Paragraph (4)(A) directs NHTSA to specify: (1) how early warning information will be reviewed and used to assist in identifying defects, (2) what systems and processes will be put in place, and (3) the manner and form of reporting such information. Paragraphs (4)(B) and (4)(D) illustrates Congress' sensitivity to the burden being imposed on manufacturers. Under Paragraph (4)(B), information demanded from manufacturers must be limited to what is in their possession; under Paragraph (4)(D), NHTSA must not impose unduly burdensome requirements on manufacturers (taking into account manufacturers' cost and NHTSA's ability to use the information sought in a meaningful manner to assist in the identification of defects). Consistent with the focus of the other paragraphs of Subsection (4) on the Agency's use of the information and the burden on the manufacturers, (4)(C), the subject provision places a restriction on wholesale disclosure of early warning information. Conflating these subsections, it is clear Congress did not intend to place heavy burdens on the reporting entities or force the disclosure of massive amounts of data and information that have historically not been disseminated publicly.

Congress' intent to protect early warning information from disclosure is further demonstrated in a colloquy on the floor of the U.S. House of Representatives between Congressman Edward Markey (D-MA) and the Chairman of the House Energy and Commerce Committee, Rep. Billy Tauzin (R-LA):

> Mr. MARKEY: [U]nder the section entitled "early warning requirements," we provide for the reporting of new information to NHTSA generally at an earlier stage than the stage when an actual recall takes place based on the finding of a defect. To protect the confidentiality of this new early stage information, the bill provides in Section 2(b) in the subsection titled "disclosure" that such information shall be treated as confidential unless the Secretary makes a finding that disclosure would assist in ensuring public safety, but with respect to information that NHTSA currently requires to be disclosed to the public, it is my understanding of the committee's intention that we not provide manufacturers with the ability to hide from public disclosure information which under current law must be disclosed. Would the gentleman from Louisiana (Mr. TAUZIN) agree that this special disclosure provision for new early stage information is not intended to protect from disclosure that [information which] is currently disclosed under existing law, such as information about actual defects or recalls?
> Mr. TAUZIN: Mr. Speaker, the gentleman is correct.

Congressional Record, Oct. 10, 2000 at H9629 (emphasis added).

This exchange took place between two of the principal sponsors of the House version of the TREAD Act, which was passed without amendment by the U.S. Senate. The concern addressed in this colloquy is the continuing release of data "about actual defects or recalls" under appropriate circumstances, which NHTSA was authorized to disclose prior to the passage of the TREAD Act. Representative Markey sought and received confirmation that

after passage of the Act, NHTSA would continue to be able to disclose such information. RMA is not advocating a different result. But Congress was explicit that, absent the requisite determination concerning a specific defect or noncompliance, NHTSA would be prohibited from disclosing the routine and comprehensive early warning data submitted by tire and other covered manufacturers.

Groups that have generally favored broad disclosure policies have conceded this reading of the statute. For example, Public Citizen has repeatedly acknowledged that paragraph (4)(C) prohibits disclosure of early warning information.[4] Nonetheless, NHTSA's former Chief Counsel has expressed the view that paragraph (4)(C) restricts disclosure by the Agency on its own initiative under 49 U.S.C. § 30167(b), but that it does not bar disclosure otherwise.[5] This interpretation is incorrect because it fails to take into account that:

(1) Paragraph (4)(C) prohibits disclosure of all early warning information, not simply early warning information that is otherwise entitled to confidential treatment.[6]

(2) The reference to FOIA in section 30167(b) was to make clear that the mandatory disclosure provision in that section was not dependent on a FOIA request.

(3)As previously discussed, Congress, in paragraph (4)(C), directed the Secretary not to disclose any of the early warning information unless the Secretary determines that the disclosure would assist in carrying out defect and noncompliance investigations.

NHTSA's former Chief Counsel would render paragraph (4)(C) unnecessary, asserting that: "Paragraph (4)(C) simply clarifies that information submitted under TREAD that is determined to be entitled to confidential treatment cannot be disclosed in the absence of . . . [a finding by the Secretary that the disclosure will 'assist in carrying out' the Act."].[7] However, under that approach, if paragraph (4)(C) had never been enacted, the result would be the same: early warning information would be disclosed if it is determined to be nonconfidential: early warning information would not be disclosed if it is determined to be confidential, unless the Secretary determines that disclosure will assist in carrying out the Act.

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4 *E.g.*, Public Citizen, *House Auto Safety Legislation Sets Up Hurdles for Regulators, Is Riddled With Defects*, Press Release of Oct. 4, 2000 ("The T.R.E.A.D. bill (H.R. 5164) adds secrecy provisions, where there are now disclosure provisions"); Public Citizen, *Public Citizen Calls on Senate to Amend House Auto Safety Legislation*, Press Release of Oct. 11, 2000 (noting that the House bill would shield early warning information from disclosure under the Freedom of Information Act); Public Citizen, *The Ford/Firestone T.R.E.A.D. Bill (H.R.. 5164) Reduces Public Access to Crucial Safety Defect Information*, Press Release of Oct. 18, 2000 (noting the bill's nondisclosure requirements imposed on NHTSA).

5 *See* Chief Counsel's memorandum of Oct. 27, 2000 (addressing points made in Public Citizen's October 19, 2000 letter); NHTSA's Advance Notice of Proposed Rulemaking issued on January 12, 2001 (66 Fed. Reg. 6532, 6543-44 (Jan. 22, 2001)). A copy of Public Citizen's letter is contained in Attachment 1.

6 Moreover, Section 30167(b), which is referenced in paragraph (4)(C), is not restricted to disclosure of confidential information. If the information is otherwise confidential, disclosure is governed by section 30167(a). 49 U.S.C. § 30167(a) and (b).

7 Memorandum of October 27, 2000 at 3.

But such constructions are to be avoided. The cases are quite numerous that counsel against construing statutes in such a way as to render them superfluous. See, e.g., Dunn v. Commodity Futures Trading Comm'n, 519 U.S. 465, 472 (1997); American Nat'l Red Cross v. S.G., 505 U.S. 247, 263 (1992).

D. THE RESTRICTION ON DISSEMINATION OF EARLY WARNING INFORMATION IS REASONABLE, FAIR, AND CONSISTENT WITH WELL-ESTABLISHED PUBLIC POLICY NORMS

When one considers the scope and breadth of early warning information that will be submitted to NHTSA, it is not surprising that Congress chose to restrict public disclosure. With respect to tires, early warning information will include information on nearly every tire made by every manufacturer in the United States and nearly every tire imported into the United States. That information will include extraordinarily sensitive business data, which each company takes pains to keep secret, including among other things, the volume of production for each tire (not just by tire line but by stock keeping unit ("SKU")); the identity of each manufacturer's private label customers and the volume of production, by SKU, for each; the identification of each manufacturer's green tire groups and the identification of tires made from each green tire; and information on warranty adjustments, claims and notices regarding property damage and incidents involving death and injury. As noted, this comprehensive information for nearly every tire made in, or imported into, the U.S. is likely to be included in NHTSA's early warning information database. The collection, sorting, and analysis of data that are accumulated in the early warning information database may eventually lead to the opening of a defect or noncompliance investigation with respect to a particular tire or tire line, at which time, the Secretary might determine that disclosure of certain information could be of assistance in carrying out the Agency's investigation or indeed would be necessary to promote safety.

Congress determined that there should not be a wholesale disclosure of early warning information. Release of early warning information would be at odds with U.S. antitrust laws (which protect competition) and would threaten to cause substantial economic harm to individual competitors.

Because of its highly anti-competitive effect, exchange of individual companies' production data has been enjoined in numerous judicial decisions under the federal antitrust laws. American Column & Lumber Assn. v. United States, 257 U.S. 377 (1921) (monthly production reports, daily sales reports, monthly stock reports and price lists exchanged by members of American Hardwood Manufacturers' Association held illegal); United States v. National Assn. of Leather Glove Manufacturers, Inc., 1953 CCH Trade Cas. ¶ 67, 623 (N.D.N.Y. 1953) (exchange of production information enjoined); United States v. Knitted Glove & Mitten Manufacturers, 1954 CCH Trade Cas. ¶ 67, 638 (N.D.N.Y. 1953) (exchange of production data enjoined except for "compiling, disseminating and communicating said figures in a general and composite form to all persons and public without identifying the production figures gathered from any particular persons"); United States v. California Rice Industry 1940-43 CCH Trade Cas. ¶ 56, 168 (N.D. Cal. 1941) (exchange of production information enjoined except such data as does not disclose "the amount of any paddy rice

processed by any individual processor"); United States v. Libby-Owens-Ford Glass Co., 1948-49 CCH Trade Cas. ¶ 62, 323 (N.D. Ohio 1948) (Paragraph V1.A - enjoining disclosure, dissemination or communicating "any information concerning the production of…flat glass").

In addition to harming competition, as noted, the release of company-specific production information would cause substantial economic harm to individual competitors. For example, if released:

(a) Production volume by SKU could reveal marketing plans and vulnerabilities, facilitating competitors' targeting;
(b) Production volume by tire line (and by SKU) could reveal private label customers' purchases;
(c) Green tire application could reveal highly guarded competitive information;
(d) Warranty rates could reveal production and, even without actual production numbers, would reveal marketing strategies; and
(e) Property damage rates could reveal production.

Thus, NHTSA and various other agencies,[8] in dealing with company data far less detailed and comprehensive than early warning information, have scrupulously maintained the confidentiality of such information on an individual company basis. *See* Argument II, *infra*.

The comprehensiveness of, and the level of detail in, the early warning information makes for an exceptionally strong case for nondisclosure. As is routinely recognized and respected by NHTSA and other government agencies, such commercial information is of substantial economic value to the owner of the information, and that value is directly dependent upon the confidentiality of the information remaining uncompromised.[9]

To the extent that there is early warning information that would not be protected from disclosure for the above reasons, the release of such information by itself would not serve the objectives of the TREAD Act. Such information would be capable of misuse and confusion. Given that the residue of early warning information not protected from disclosure is at most quite small, with the capability of casting more fog than light, Congress sensibly resorted to a blanket

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[8] The U.S. Bureau of Census publishes numerous statistical surveys reporting industrial and commercial production, shipments, sales, inventories, and the like. Each of these reports relies upon data compiled from forms or returns provided by individual companies: in some instances, the reports are compiled directly from individual transaction records. In every case, however, Census avoids the release of information in any form by which the data furnished by a particular establishment can be identified.

[9] In fact, in 1996, Congress enacted the Economic Espionage Act, thereby establishing the federal crime of theft of confidential information, including ("financial, business . . . (and) economic . . . information, including plans . . . compilations," among other things), which would appear to cover virtually all early warning information. 18 U.S.C. §§ 1832, 1839(3). It would be anomalous for Congress now to legislate a program under which an agency is directed to collect, on a continuing basis, huge amounts of information from competitors in some of the nation's largest industries, the theft of which would constitute a recently legislated federal crime, punishable by fine and/or as much as ten years of imprisonment, and then turn over the information into the hands of competitors or other members of the public.

(b)(3) FOIA exemption approach rather than a piecemeal (b)(4) approach, under which the Agency and the information owners would have had to expend significant resources with no public benefit to be served. *See* discussion of the Data Quality Act in III.A., *infra*.

II. NHTSA's PROPOSAL TO TREAT CERTAIN TYPES OF TIRE DATA AS PRESUMPTIVELY NON-CONFIDENTIAL IS CONTRARY TO LAW AND THE AGENCY'S PAST PRACTICE

A. NHTSA'S PAST PRACTICE HAS BEEN TO GRANT CERTAIN TYPES OF TIRE DATA CONFIDENTIAL STATUS

Of course, NHTSA has granted certain types of data confidential status under FOIA in the past. However, certain statements in the NPRM have given us cause for concern that NHTSA may be of the view that such sensitive information as warranty adjustments (and similarly sensitive information) may merit different treatment and may have been treated differently. (*see, e.g.,* 67 Fed. Reg. 21200 (first column)). We wish to put any such doubts to rest. Indeed, on many occasions, NHTSA's Office of Chief Counsel has granted tire manufacturers' requests for confidential treatment of warranty adjustments, production data, and related information.

Attachment 2 contains redacted copies of representative letters from the Chief Counsel's office to several tire manufacturers granting confidential treatment of this data under the "substantial competitive harm" test of FOIA. Thus, NHTSA's own past practice fully supports confidential treatment of this data.

This competitively sensitive data includes but is not limited to:

(1) Common Green Tire List

RMA defines common green tires as: "tires that are produced to the same internal specifications, but that have, or may have, different external characteristics and may be sold under different model designations." The listing of tires that constitute the common green is confidential business information. The release of this information would cause substantial competitive harm since it would allow competitors to know with exact certainty which tires have the same specifications even though they are sold under differing tire brand names. Furthermore, substantial competitive harm would result from releasing with exact specificity the relationships between manufacturers and private brand name owners.

(2) Tire Production Numbers

If tire production numbers, or any information from which tire production quantities could be derived, are released, manufacturers could change production of types, sizes, and lines of tires after reviewing competitor's data. For instance, a company may decide to cut back on production of snow tires after reviewing data indicating a competitor is producing sufficient quantities to supply the market or planning a promotion. Unlike automobile manufacturers, tire manufacturers can alter and change the course of production in a

relatively short period of time. This ability to change production dependent on the production output of a competitor could stifle competition.

NHTSA and various other agencies, have scrupulously maintained the confidentiality of such information on an individual company basis. As previously discussed, the Agency has repeatedly declined to disclose tire production and warranty adjustment data on the grounds that to do so would likely cause substantial competitive harm.

(3) Warranty Adjustments

NHTSA has traditionally treated warranty adjustment data as confidential business information and should continue to do so. As NHTSA is aware, warranty policies differ greatly from tire manufacturer to tire manufacturer and from tire to tire. Consumers and the marketplace strongly influence the terms of these warranties. Key warranty provisions are often used as a marketing tool and warranty adjustments are not an indication of tire performance.

Finally, RMA is a party to a consent order with the Federal Trade Commission prohibiting the association from collecting or disseminating competitively sensitive information, including warranty information. (Attachment 3 at Section IV. A). The FTC found that the release of this information could prove anti-competitive and contrary to the public interest. The release of warranty adjustment data by NHTSA would impair the ability of tire manufacturers to compete in the marketplace.

B. THIS DATA SATISFIES FOIA EXEMPTION 4

The information outlined above is entitled to protection from disclosure under Exemption 4 of the Freedom of Information Act, 5 U.S.C. §552(b)(4), which applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." As discussed above, tire manufacturers consider this competitively sensitive information and take appropriate measures to protect it from disclosure to the public, which obviously includes each tire manufacturer's competitors.

Case law construing Exemption 4 of the FOIA also demonstrates that this data should be given confidential treatment by the Agency. Information produced involuntarily to a government agency will be considered confidential only if disclosure would either impair the government's ability to obtain necessary information in the future or cause substantial harm to the competitive position of the submitter. Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 878-80 (D.C. Cir. 1992). Companies need not show actual competitive injury to qualify for the exemption. Niagra Mohawk Power Corp. v. U.S. Dep't of Energy, 169 F.3d 16, 18 (D.C. Cir. 1999). The courts have also held that pricing, rebate and incentive information, if disclosed, would constitute substantial competitive harm. Mallinckrodt, Inc. v. West, 140 F. Supp. 2d 1 (D.D.C. 2000).

III. NHTSA HAS FAILED TO COMPLY WITH REGULATORY REQUIREMENTS THAT ARE APPLICABLE TO THIS RULEMAKING

A. EARLY WARNING DATA WOULD LACK UTILITY AND OBJECTIVITY AND WOULD VIOLATE THE DATA QUALITY ACT

The Data Quality Act will prohibit government dissemination of information that does not meet the quality standards set by the Act and OMB. 44 USC § 3516 (statutory and historical notes). OMB's February 22nd government-wide implementing guidelines require that information disseminated on or after October 1, 2002 must:

(A) Be objective, including the requirement to be "presented within a proper context;" and

(B) Possess utility.

DOT's draft implementing Data Quality guidelines also contain comparable objectivity and utility requirements. The early warning data would satisfy neither of these requirements.

(A) Objectivity. The Data Quality Act requires that information be presented in proper context when such context is necessary to ensure an "accurate, clear, complete and unbiased presentation." That context will not be present with the early warning information.

Specifically, data pertaining to warranty adjustments could only be understood in light of the marketing and economic decisions which lead to manufacturers setting specific warranty terms and conditions. No two warranty programs in the tire industry are alike, and therefore comparisons of warranty adjustment data among tire manufacturers would be meaningless. For example, a manufacturer may lengthen the term of a given tire's warranty in response to competitive challenges even if the tire itself remains unchanged. Thus, with a longer warranty, an increased number of warranty adjustments could be expected for the tire without indicating in any way that there are problems with or even changes in the tire itself. Yet the public undoubtedly would be led to believe that higher numbers of adjustments are indicative of a product problem.

As another example, the process of examining a tire and determining how to code the condition of the tire varies from manufacturer to manufacturer. Some manufacturers visually inspect the intact tire, while others cut the tire open to examine the interior. These differences in examination approach could lead to different coding from manufacturer to manufacturer for the same underlying condition. Comparing the “visual inspection” manufacturer’s data to that of the manufacturer who performed the invasive examination in this situation could misleadingly imply a difference in the relative quality of the two tires when there was none. Similarly, reporting on unverified property damage claims can paint a misleading picture, as it has been the manufacturers’ experience upon examining the tires involved that many of these claims do not even correctly name the brand or manufacturer of the tire, much less correctly identify the condition of the tire!

(B) Utility. Routinely reported early warning data has no utility to the public at large since they have no basis for making any safety-related or economic decisions based on the data. This is because early warning data is just that - - early - - and, standing alone, the data is not indicative of any problem associated with a particular tire or tire line.

Other possible early warning elements, such as field reports, also raise substantial data quality concerns since there is no standard definition of "field report" in the tire industry. RMA's comments of February 4, 2002 to NHTSA Docket No. 8677; Notice 2 contain a thorough discussion of the industry's position on "field reports".

B. NHTSA'S PROPOSED PAPERWORK REQUIREMENTS (PRA) FOR CONFIDENTIAL BUSINESS INFORMATION ARE DUPLICATIVE, NEEDLESSLY BURDENSOME AND WOULD VIOLATE THE PAPERWORK REDUCTION ACT

The PRA requires that federal agencies proposing to collect information must adopt procedures that minimize the paperwork burden on companies and ensure that the collection and dissemination of information is consistent with other privacy and disclosure laws. 44 U.S.C. § 3501. NHTSA's proposed procedures regarding the submission of requests for confidential treatment are duplicative and would create an enormous and unreasonable paperwork burden on RMA's members and thus would violate the PRA. Since RMA anticipates that tire manufacturers would continue to request confidentiality for data on an ongoing basis, the procedures outlined below would impact the submission of confidential business information and early warning reporting data.

Under NHTSA's proposed revisions to 40 C.F.R. Part 512, tire manufacturers must comply with the following procedures each time a request for confidential treatment is submitted to the Agency:

(1) Triplicate Paperwork Requirements. The proposed rule would require companies requesting confidential treatment of data to submit at least three versions of the same basic information. The submitter would be required to send:

(a) A complete copy to the NHTSA office requesting the information;
(b) A redacted copy of the information for which confidentiality is requested to the office requesting the information;
(c) A copy containing confidential information to the Office of Chief Counsel. This copy would be accompanied by a certificate and supporting information; and
(d) If the information is being sent in connection with an established public docket, a redacted copy would also be sent to the docket.

(2) Stamping Each Page. In preparing the information for submission, each page that contains confidential information must be clearly stamped or marked with the word *confidential* and separately and uniquely numbered. If portions of a page are claimed to be confidential, such portions must be marked by enclosing them within brackets. See proposed 512.5 (a); 67 Fed. Reg. at 21203, col. 2.

(2) Removal of Personal Information from the Duplicative Redacted Version. Any personal information contained in submissions, such as names, addresses and telephone numbers of consumers, must be removed from the redacted version of the submitted information. Although ensuring that personal information is not made public is important, NHTSA's proposal requires needless and, thus, impermissible duplication of paperwork.

(3) Duplicative and Needlessly Burdensome Information Requests. Each quarterly request for confidential treatment must include the following supporting information: (a) a description of the information for which confidentiality is being requested; (b) the specific confidentiality standard under which the request should be evaluated; and (c) a detailed justification for applying the specific confidentiality standard to the information. See proposed §512.8; 67 Fed. Reg. at 21203, col. 3-21204, col. 1.

The needlessly duplicative and burdensome requests associated with applying for confidentiality conflicts with the express purpose of the PRA to limit the paperwork burdens on regulated entities.

C. NHTSA'S PROPOSED CLASSIFICATION OF EARLY WARNING DATA AS NON-CONFIDENTIAL IS A SIGNIFICANT REGULATORY ACTION UNDER EXECUTIVE ORDER 12866

NHTSA's proposed classification of early warning data as non-confidential is a significant regulatory action under Executive Order 12866 since it would "adversely affect in a material way . . . a sector of the economy, productivity, competition, jobs . . ." The Order defines regulatory actions as "significant" if they would result in any of the these adverse impacts even if the overall economic impact is less than $100 million per year.

(A) Competitive Impact on the Tire Manufacturing Industry. As discussed above, the early warning data is competitively sensitive and would be used by other manufacturers in making various marketing and other strategic decisions. Thus, NHTSA's proposed disclosure of the data would have an adverse impact on competition in an important sector of the economy and needs to be reviewed by OMB.

(B) Jobs. Disclosing early warning data would adversely impact competition in tire manufacturing. Furthermore, there could also be consolidation among tire lines which could also adversely impact jobs as well as consumer choice.

Since NHTSA's proposed classification of early warning data as non-confidential clearly falls within Executive Order 12866's definition of a significant regulatory action, the Agency needs to perform the associated economic and regulatory analyses and provide them to OMB and the public for comment. In that NHTSA has already suggested that an additional comment period on the proposed rule may be appropriate, this new comment period would provide the opportunity for comment on NHTSA's required E.O. 12866 analyses.

IV. NHTSA SHOULD AMEND CERTAIN ASPECTS OF THE GENERAL PROVISIONS

RMA believes that NHTSA should retain its current requirements regarding submission of both confidential and public documents to be submitted to the Chief Counsel's office. By creating differing requirements for submission to Chief Counsel as opposed to other divisions of NHTSA, NHTSA has required three different sets of documents be submitted to NHTSA. RMA believes this duplicative and cumbersome process is unnecessary for submission of confidential business information and that the current requirements should be retained.

RMA is opposed to any request that manufacturers redact personal information. In addition, RMA is opposed to any requirement to constantly amend justifications and certifications for confidentiality.

V. CONCLUSIONS

(1) The Agency's disclosure of early warning data - - whether confidential or not - - would be a direct violation of the TREAD Act.

(2) The Agency has no authority to disclose early warning data under FOIA.

(3) Classifying certain data as non-confidential would be inconsistent with NHTSA's past policy and practice.

(4) The Data Quality Act prohibits disseminating early warning data lacking objectivity and utility after October 1, 2002.

(4) Proposing to classify early warning data as non-confidential is a significant regulatory action under Executive Order 12866 and needs to be reviewed by OMB.

(5) The proposed paperwork requirements associated with confidential early warning data are duplicative, needlessly burdensome and would violate the Paperwork Reduction Act.

(6) NHTSA's proposed CBI policy for early warning data is arbitrary, capricious and not in accordance with law.

VI. RECOMMENDATIONS

(1) NHTSA should treat all tire-related early warning information as confidential.

(2) NHTSA should not require tire manufacturers to comply with the procedures of proposed 49 C.F.R. 512 each time an early warning report is submitted.

ATTACHMENT 1

Public Citizen

Buyers Up • Congress Watch • Critical Mass • Global Trade Watch • Health Research Group • Litigation Group
Joan Claybrook, President

October 19, 2000

Mr. Rodney E. Slater
Secretary of Transportation
Department of Transportation

Dear Mr. Slater,

We are deeply disappointed that the administration supported the passage of the House version of the Transportation Recall Enhancement Accountability and Documentation (TREAD) Act without any effort to remove the most damaging parts of that legislation. We object in particular to two sections of the bill.

The secrecy provision in sec. 3(b)(4)(C) is imposed upon all safety defect information collected as part of the bill's "early warning reporting requirements" rulemaking. We believe that the secrecy provision thwarts the clear purpose of the legislation— to protect the public from defect cover-ups— and may drastically reduce public access to safety defect information. Under that section, the Secretary *shall not* disclose defect and early warning information about lawsuits, consumer complaints, deaths, injuries, component failures or consumer satisfaction campaigns *unless* you determine that disclosure will assist in carrying out the law. This inverts existing law, as the current presumption of 49 U.S.C. sec. 30167(b) is to favor disclosure over and above the disclosure requirements of the Freedom of Information Act (FOIA). Indeed, the function of this reversal in presumptions is to create a categorical exemption under FOIA's exemption three, and thus to keep information submitted under the new rule totally secret, perhaps indefinitely.

We also mourn the repeal in H.R. 5164 of the provision of the FY 2001 Department of Transportation Appropriations Bill authored by Rep. Frank R. Wolf and Sen. Richard C. Shelby that created an affirmative duty for manufacturers to evaluate accident, component failure and consumer complaint data for signs of a dangerous defect. This provision is critical because industry lobbyists earlier succeeded in removing any language from the final version of the TREAD bill that would enhance NHTSA's power to require companies to analyze or draw conclusions from in-house data. As our experience with the latest Ford and Firestone tragedies dramatically shows, manufacturers retain an enormous information advantage in dealing with both government and the public. Without an affirmative duty to analyze data, as recent news articles have repeatedly documented, auto manufacturers may continue to publicly deny the existence of a dangerous defect and to withhold this evidence from the public and NHTSA, even as that evidence accumulates in company files.

Before you leave office in January, we urge that you correct these serious deficiencies by acting to define through regulation the interests of the public in meaningful access to enforcement information and the responsibility of manufacturers to fully inform both NHTSA and the public of potential safety defects.

Sincerely,

Joan Claybrook
President, Public Citizen

ATTACHMENT 2

U.S. Department
of Transportation
**National Highway
Traffic Safety
Administration**

400 Seventh St., S.W.
Washington, D.C. 20590

DEC 19 2001

[redacted]
Attorney
[redacted]

RE: Confidentiality Determination [redacted]

Dear Mr. [redacted]

This is in response to your letter dated [redacted] in which you request confidential treatment for the documents enclosed with your letter and [redacted] You state that the documents contain tire production data and manufacturing capacity; field compliance, property damage claims and adjustment/warranty data; analysis of design, materials and manufacture of [redacted] tires, including proprietary test procedures; claims paid (including number of claims and amounts paid); and sensitive manufacturing costs information. You request confidential treatment for this information for an unspecified period of time.

[redacted] asserts that disclosure of any of the information would harm the legitimate business and competitive interests of [redacted] asserts that, with respect to production data, competitor manufacturers would like to know the numbers and capacity of plants of others in the industry and release of this information would therefore harm the competitive position of [redacted] while providing no value to the public.

[redacted] asserts that, with respect to adjustments/warranty claims, adjustment programs and warranty actions in the tire industry are directed at consumer satisfaction and repurchase intent. [redacted] asserts that it has a specific and confidential approach regarding product adjustments and customer satisfaction issues and that its willingness to go beyond written policies for customer satisfaction objectives, and the basic way in which this data is captured, stored and analyzed are basic to [redacted] competitive position in the market place. [redacted] asserts that consumer satisfaction is a key element in marketing and continued profitability of [redacted] Accordingly, [redacted] asserts that warranty and adjustment data are confidential business information and that their release would result in substantial competitive harm to [redacted]

Similarly, [redacted] asserts that its approach to property damage claims is closely associated with its approach to its adjustment and warranty program, and that customer satisfaction is the key element. [redacted] asserts that the extent to which the company is willing to go to accomplish customer satisfaction objectives is a key element in marketing and is basic to [redacted] competitive position and that release of such information could be used unfairly to disadvantage that position.

Finally, [redacted] asserts that the documents that relate to [redacted] extensive analysis of the design materials and manufacture of [redacted] tires contain design and manufacturing details, as well as sensitive and highly proprietary information regarding manufacturing costs. [redacted] asserts also that these documents reflect engineering evaluation of design, compounding, chemical properties and curing specifications and that the methods used, the factors evaluated and the manufacturing details incorporated into these documents are all proprietary, sensitive, trade secret information [redacted] and that the release of this information would give [redacted] competitors access to data not otherwise available to them.

I have reviewed your submission, including the materials that you claim are entitled to confidential treatment and the arguments that you assert in support of your claim. While I have not reached a conclusion regarding each individual argument that you assert, I have concluded based upon your submission as a whole that the public release of these materials is likely to cause substantial competitive harm to [redacted] Therefore, these materials are entitled to confidential treatment pursuant to Exemption 4 of the Freedom of Information Act, 5 U.S.C. §552(b)(4).

With respect to the adjustment/warranty claims, I find that the release of this information would enable a competitor to ascertain the production data of the product and, therefore, that these materials also are entitled to confidential treatment pursuant to Exemption 4 of the Freedom of Information Act, 5 U.S.C. §552(b)(4).

All of these materials will be protected for an indefinite period of time

This grant of confidential treatment is subject to certain conditions since these materials were submitted [redacted] by the agency. These materials may be disclosed under the authority of 49 U.S.C. §30167(b) and 49 C.F.R. §512.9(a)(2), if the agency decides the disclosure will assist in carrying out the purposes of 49 U.S.C. Chapter 301.

In addition, this material may be disclosed under 49 C.F.R. §512.8, based upon newly discovered or changed facts, and you must inform the agency of any changed circumstances

which may affect the protection of the information (49 C.F.R. §512.4(i)). Prior to the release of information under 49 C.F.R. §512.8 or §512.9, you would be notified in accordance with the procedures established by our regulations.

Sincerely,

Heidi L. Coleman
Assistant Chief Counsel
for General Law

U.S. Department
of Transportation
**National Highway
Traffic Safety
Administration**

400 Seventh St., S.W.
Washington, D.C. 20590

OCT 23 2001

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

[redacted]
Attorney
[redacted]

RE: Confidentiality Determination/[redacted]

Dear Mr. [redacted]

This is in response to your letter dated [redacted] and your letter dated [redacted] requests confidential treatment for supplemental data prepared in response to NHTSA's Request for Information [redacted] Specifically, [redacted] requests confidential treatment for supplemental materials provided in response to [redacted] requests confidential treatment for these materials for an unspecified period of time.

[redacted] asserts in his letter dated [redacted] that these documents provide analyses of the property damage claims submitted to the agency by dollar amounts and vehicle type [redacted] He asserts that [redacted] believes these documents will provide NHTSA a better understanding of the nature and extent of these claims. He asserts that, in conjunction with [redacted] initial response to request [redacted] requested and was granted confidential treatment for this data by letter dated [redacted] from Heidi L. Coleman, Assistant Chief Counsel for General Law. Finally, he asserts that, since the supplemental documents now being submitted to NHTSA provide a more detail analysis of this same data, it should be accorded the same confidential treatment previously granted.

You assert in your letter dated [redacted] that [redacted] approach to property damage claims is closely associated with the adjustment and warranty program with customer satisfaction being the key element and that the extent to which the company is willing to go to accomplish customer satisfaction objectives is a key element in marketing and is basic to [redacted] competitive position in the market place. Therefore, you assert that the release of these additional documents submitted to NHTSA could result in substantial competitive harm.

I have decided to grant your request for confidential treatment for these materials.

I have reviewed your submission, including the materials that you claim are entitled to confidential treatment and the arguments that you assert in support of your claim. While I have not reached a conclusion regarding each individual argument that you assert, I have concluded based upon your submission as a whole that the public release of the supplemental data contained in response to [redacted] is likely to cause substantial competitive harm to [redacted] and, therefore, that this information is entitled to confidential treatment pursuant to Exemption 4 of the Freedom of Information Act, 5 U.S.C. §552(b)(4). These materials will be protected for an indefinite period of time.

This grant of confidential treatment is subject to certain conditions [redacted] The information may be disclosed under the authority of 49 U.S.C. §30167(b) and 49 C.F.R. §512(a)(2), if the agency decides the disclosure will assist in carrying out the purposes of the National Traffic and Motor Vehicle Safety Act.

In addition, this material may be disclosed under 49 C.F.R. §512.8, based upon newly discovered or changed facts, and you must inform the agency of any changed circumstances which may affect the protection of the information (49 C.F.R. §512.4(i)). Prior to the release of information under 49 C.F.R. §512.8 or §512.9, you would be notified in accordance with the procedures established by our regulations.

Sincerely,

Heidi L. Coleman
Assistant Chief Counsel
for General Law

U.S. Department
of Transportation
**National Highway
Traffic Safety
Administration**

400 Seventh St., S.W.
Washington, D.C. 20590

MAR 13 2001

RECEIVED
MAR 13 2001

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

RE:

Dear

This is in response to your letter dated , to in which you request confidential treatment for certain information submitted by to the National Highway Traffic Safety Administration (NHTSA) on . This information includes:

production data (document numbers and and

claims and adjustment rate information and statistical analysis of its own claims information (document numbers and

You requested confidential treatment for these materials for a period of ten years. I have decided to grant your request for confidential treatment for these materials for the period of time requested.

You assert that the production data include tire production figures which are reflective of sales, market acceptance and competitive position. You assert also that tire companies closely guard information of this type from competitors because it can reveal markets that have been developed only as a result of costly and labor intensive investment over periods of years. You assert that disclosure of this information could result in economic hardship and competitive disadvantage to

You assert that the claims and adjustment rate information and own analysis of this claim information has been performed in the course of responding to NHTSA's investigation involving the subject tires at considerable expense to In addition, you assert that the disclosure of this information would permit competitors to gain unfair advantage without commensurate investment. Finally, you assert that this information could be used to disparage products which would cause irreparable harm to reputation in the marketplace.

I have reviewed your submission, including the materials that you claim are entitled to confidential treatment and the arguments that you assert in support of your claim. While I have not reached a conclusion regarding each individual argument that you assert, I have concluded based upon your submission as a whole that the public release of the production data, claims and adjustment rate information and statistical analysis are likely to cause substantial competitive harm to . Therefore, these materials are entitled to confidential treatment pursuant to Exemption 4 of the Freedom of Information Act, 5 U.S.C. §552(b)(4). These materials will be protected for the period of time requested (until February 9, 2011).

Although we have not reached a conclusion regarding whether the release of this information would result in "disparaging of reputation," we note that this is not a competitive harm generally recognized under exemption 4 of the FOIA.

This grant of confidential treatment is subject to certain conditions since the information for which confidentiality has been granted was submitted pursuant to a defect investigation. The information may be disclosed under the authority of 49 U.S.C. § 30167(b) and 49 C.F.R. §512.9(a)(2), if the agency decides the disclosure will assist in carrying out the purposes of the National Traffic and Motor Vehicle Safety Act.

In addition, these materials may be disclosed under 49 C.F.R. § 512.8, based upon newly discovered or changed facts, and you must inform the agency of any changed circumstances which may affect the protection of the information (49 C.F.R. § 512.4(i)). Prior to the release of information under § 512.8 or § 512.9, you would be notified in accordance with the procedures established by out regulations.

Sincerely,

Heidi L. Coleman
Assistant Chief Counsel
for General Law

U.S. Department
of Transportation
**National Highway
Traffic Safety
Administration**

400 Seventh St., S.W.
Washington, D.C. 20590

OCT - 2 2001

RE:

Dear

This is in response to your letter dated in which you request confidential treatment on behalf of for the materials enclosed with your letter. You state that the materials include the following:

[redacted]

You request confidential treatment for these materials for an unspecified period of time.

You assert that these materials contain clearly commercial information and that disclosure of this information would likely cause substantial harm to competitive position. You assert also that the materials contain detailed, proprietary information concerning tests and analyses conducted by evaluate various tire performance characteristics for and its competitors' tires. You assert also that the materials include proprietary information concerning claims and that disclosure of this information to competitors will likely cause substantial harm to competitive position because, *inter alia*, disclosure would provide competitors with the product and defect evaluation methods used by to address product quality and performance issues.

I have reviewed your submission, including the materials that you claim are entitled to confidential treatment and the arguments that you assert in support of your claim. While I have not reached a conclusion regarding each individual argument that you assert, I have concluded based upon your submission as a whole that the public release of these materials is likely to cause substantial competitive harm to Therefore, I conclude that these materials are entitled to confidential treatment pursuant to Exemption 4 of the Freedom of Information Act, 5 U.S.C. §552(b)(4). They will be protected for an indefinite period of time.

This grant of confidential treatment is subject to certain conditions since these materials were submitted in connection with a defect investigation by the agency. These materials may be disclosed under the authority of 49 U.S.C. §30167(b) and 49 C.F.R. §512.9(a)(2), if the agency decides the disclosure will assist in carrying out the purposes of 49 U.S.C. Chapter 301.

In addition, this material may be disclosed under 49 C.F.R. §512.8, based upon newly discovered or changed facts, and you must inform the agency of any changed circumstances which may affect the protection of the information (49 C.F.R. §512.4(i)). Prior to the release of information under 49 C.F.R. §512.8 or §512.9, you would be notified in accordance with the procedures established by our regulations.

Sincerely,

Heidi L. Coleman
Assistant Chief Counsel
for General Law

U.S. Department
of Transportation
**National Highway
Traffic Safety
Administration**

DEC 10 2001

400 Seventh St., S.W.
Washington, D.C. 20590

RECEIVED
DEC 14 2001

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

RE:

Dear

This is in response to your letter dated , in which you request confidential treatment for identified excerpts and exhibits from [redacted] depositions of and and selected exhibits from the deposition of Specifically, confidential treatment is requested for information contained on the pages identified by the following !

You state that these materials contain design specifications, manufacturing processes and methods, testing data, material property and tire construction features, production data, testing documents, a list of materials used in tire construction and a list of approved material suppliers, claims and adjustment rate information, and cost and pricing information. You request confidential treatment for these materials for an indefinite period of time.

You assert that the design specifications, manufacturing processes and methods, testing data, material property and tire construction features were developed over considerable time and at great expense to , and were developed as the result of extensive research, development and testing that established not only the functionality of these features, but ultimately their market acceptability as well. You assert that, if disclosed, a competitor could appropriate this information without the normal expense of testing and analysis, and the delays of the trial and error process. You assert that such information would be a tremendous advantage to a competitor, and would result in economic hardship and competitive disadvantage to if disclosed.

You assert that the tire production data is reflective of sales, market acceptance, and competitive position and that tire companies closely guard information of this type from competitors because it can reveal markets that have been developed only as a result of costly and labor intensive investment over periods of years. You assert also that disclosure of this information could result in economic hardship and competitive disadvantage to

You assert that the testing documents detail internal development and compliance test parameters and requests and that these test methods have been developed by based upon considerable time, expense and experience. You assert also that, if test methods and criteria were made public, competitors could simply adopt them or use them to develop similar protocols without commensurate investment and thereby gain competitive advantage. In addition, you assert that, if disclosed, the test results and criteria will establish for competitors a simplified target to meet or exceed without the expense of conducting intensive comparative testing of products and that a competitive advantage would be gained at no expense whatsoever.

You assert that the documents that list the raw materials used by in manufacturing the subject tires and the list of approved material suppliers have been developed by based upon considerable time, expense and experience and that the material

specifications reveal the results of extensive research, development and testing that establish not only the functionality of these features, but ultimately their market acceptability as well. You assert also that, if disclosed, a competitor could adopt these features without the normal expense of testing and analysis, and the delays of the trial and error process. In addition, you assert that such information would be a tremendous advantage to a competitor, and would result in economic hardship and competitive disadvantage to . Further, you assert that list of approved raw material suppliers has been developed over time and at considerable expense to and that disclosure of approved material suppliers would provide a competitive advantage to competitors and would cause a corresponding economic and competitive disadvantage to , which has developed business relationships with these vendors through significant investment of time and resources.

You assert that the claims and adjustment rate information and ' analysis of this claims information has been performed at considerable expense to You assert also that disclosure of this information would permit competitors to gain an unfair advantage without commensurate investment and that this information could be used to disparage products which would cause irreparable harm to reputation in the marketplace.

Finally, you assert that the product cost and pricing information includes calculations and methodologies utilized by to determine pricing of its products and that this information is proprietary and competitively sensitive and, if disclosed, would result in significant economic harm to

I have reviewed your submission, including the materials that you claim are entitled to confidential treatment and the arguments that you assert in support of your claim. While I have not reached a conclusion regarding each individual argument that you assert, I have concluded based upon your submission as a whole that the public release of these materials is likely to cause substantial competitive harm to . Therefore, these materials are entitled to confidential treatment pursuant to Exemption 4 of the Freedom of Information Act, 5 U.S.C. §552(b)(4), and will be protected for an indefinite period of time.

Although we have not reached a conclusion regarding whether the release of this information would result in "disparaging of reputation," we note that this is not a competitive harm generally recognized under Exemption 4 of the FOIA.

This grant of confidential treatment is subject to certain conditions since the information for which confidentiality has been granted was submitted pursuant to a defect investigation. The information may be disclosed under the authority of 49 U.S.C. § 30167(b) and 49 C.F.R. §512.9(a)(2), if the agency decides the disclosure will assist in carrying out the purposes of the National Traffic and Motor Vehicle Safety Act.

In addition, these materials may be disclosed under 49 C.F.R. § 512.8, based upon newly discovered or changed facts, and you must inform the agency of any changed circumstances which may affect the protection of the information (49 C.F.R. § 512.4(i)).

Prior to the release of information under § 512.8 or § 512.9, you would be notified in accordance with the procedure established by out regulations.

Sincerely,

Heidi L. Coleman
Assistant Chief Counsel
for General Law

U.S. Department
of Transportation
**National Highway
Traffic Safety
Administration**

400 Seventh St., S.W.
Washington, D.C. 20590

SEP 24 2001

RE:

Dear

This is in response to your letter dated , in which you request confidential treatment on behalf of , for the materials enclosed with your letter. You state that the materials contain production information for all sizes of tires for the period through . You state that this information is also submitted in electronic format on a 3 ½ inch diskette. You request confidential treatment for these materials for an unspecified period of time.

You assert that these materials contain "clearly commercial" and "confidential proprietary" information that would likely subject to competitive harm if disclosed. You assert also that the disclosure of this information "would likely cause substantial harm to competitive position."

I have reviewed your submission, including the materials that you claim are entitled to confidential treatment and the arguments that you assert in support of your claim. I have concluded based upon your submission as a whole that the public release of these materials is likely to cause substantial competitive harm to Therefore, I conclude that these materials are entitled to confidential treatment pursuant to Exemption 4 of the Freedom of Information Act, 5 U.S.C. §552(b)(4). They will be protected for an indefinite period of time.

This grant of confidential treatment is subject to certain conditions since these materials were submitted in connection with a defect investigation by the agency. These materials may be disclosed under the authority of 49 U.S.C. §30167(b) and 49 C.F.R. §512.9(a)(2), if the agency decides the disclosure will assist in carrying out the purposes of 49 U.S.C. Chapter 301.

In addition, this material may be disclosed under 49 C.F.R. §512.8, based upon newly discovered or changed facts, and you must inform the agency of any changed circumstances which may affect the protection of the information (49 C.F.R. §512.4(i)). Prior to the release of information under 49 C.F.R. §512.8 or §512.9, you would be notified in accordance with the procedures established by our regulations.

Sincerely,

Heidi L. Coleman
Assistant Chief Counsel
for General Law

U.S. Department
of Transportation
**National Highway
Traffic Safety
Administration**

400 Seventh St., S.W.
Washington, D.C. 20590

AUG 27 2001

RE:

Dear

This is in response to your letter dated , in which you request confidential treatment for the enclosed documents and diskette. You assert that these materials contain compilations of production data for , and you request confidential treatment for these materials permanently.

You assert that the documents and diskette are being submitted voluntarily by to the National Highway Traffic Safety Administration (NHTSA), and that any disclosure of the information contained in these materials "would cause suffer serious, and potentially irreparable, competitive harm." You assert also that disclosure of the information "would competitively disadvantage vis-à-vis other tire manufacturers, who would use such information to sell against In addition, you assert that "disclosure could potentially inhibit competition among tire manufacturers" and that "access by competitor tire manufactures to the . . . information could potentially reduce their incentives to competitively innovate and conduct independent research."

You also requested that NHTSA return all copies of the "confidential" information to upon the conclusion of NHTSA's consideration of

I have reviewed your submission, including the materials that you claim are entitled to confidential treatment and the arguments that you assert in support of your claim. While I have not reached a conclusion regarding each individual argument that you assert, I have concluded based upon your submission as a whole that the public release of these materials is likely to cause substantial competitive harm to therefore, that these materials are entitled to confidential treatment pursuant to Exemption 4 of the Freedom of Information Act, 5 U.S.C. §552(b)(4).

Please note that these materials relate to a defect investigation and the agency will not return them to upon the conclusion of its consideration of the information. The confidential information will be held confidential for an indefinite period of time.

This grant of confidential treatment is subject to certain conditions since the information for which confidentiality has been granted was submitted pursuant to a defect investigation. The information may be disclosed under the authority of 49 U.S.C. §30167(b) and 49 C.F.R. §512(a)(2), if the agency decides the disclosure will assist in carrying out the purposes of the National Traffic and Motor Vehicle Safety Act.

In addition, this material may be disclosed under 49 C.F.R. §512.8, based upon newly discovered or changed facts, and you must inform the agency of any changed circumstances which may affect the protection of the information (49 C.F.R. §512.4(i)). Prior to the release of information under 49 C.F.R. §512.8 or §512.9, you would be notified in accordance with the procedures established by our regulations.

Sincerely,

Heidi L. Coleman
Assistant Chief Counsel
for General Law

U.S. Department
of Transportation
**National Highway
Traffic Safety
Administration**

400 Seventh St., S.W.
Washington, D.C. 20590

AUG 22 2001

RE:

Dear

This is in response to your letter dated , in which you request confidential treatment for the enclosed documents and CD-ROM. You assert that these materials contain compilations of production data for tires, and you request confidential treatment for these materials permanently.

You assert that the documents and diskette are being submitted voluntarily by to the National Highway Traffic Safety Administration (NHTSA), and that any disclosure of the information contained in these materials "would cause to suffer serious, and potentially irreparable, competitive harm." You assert also that disclosure of the information "would competitively disadvantage vis-à-vis other tire manufacturers, who would use such information to sell against In addition, you assert that "disclosure could potentially inhibit competition among tire manufactures" and that "access by competitor tire manufactures to. . . the information could potentially reduce their incentives to competitively innovate and conduct independent research."

You also requested that NHTSA return all copies of the "confidential" information to upon the conclusion of NHTSA's consideration of information.

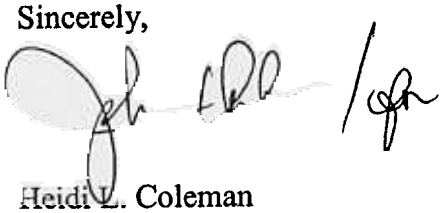
I have reviewed your submission, including the materials that you claim are entitled to confidential treatment and the arguments that you assert in support of your claim. While I have not reached a conclusion regarding each individual argument that you assert, I have concluded based upon your submission as a whole that the public release of these materials is likely to cause substantial competitive harm to and, therefore, that these materials are entitled to confidential treatment pursuant to Exemption 4 of the Freedom of Information Act, 5 U.S.C. §552(b)(4).

Please note that the materials relate to a defect investigation and the agency will not return them to _____ upon the conclusion of its consideration of the information. The confidential information will be held confidential for an indefinite period of time.

This grant of confidential treatment is subject to certain conditions since the information for which confidentiality has been granted was submitted pursuant to a defect investigation. The information may be disclosed under the authority of 49 U.S.C. §30167(b) and 49 C.F.R. §512(a)(2), if the agency decides the disclosure will assist in carrying out the purposes of the National Traffic and Motor Vehicle Safety Act.

In addition, this material may be disclosed under 49 C.F.R. §512.8, based upon newly discovered or changed facts, and you must inform the agency of any changed circumstances which may affect the protection of the information (49 C.F.R. §512.4(i)). Prior to the release of information under 49 C.F.R. §512.8 or §512.9, you would be notified in accordance with the procedures established by our regulations.

Sincerely,



Heidi L. Coleman
Assistant Chief Counsel
for General Law

U.S. Department
of Transportation
**National Highway
Traffic Safety
Administration**

MAR 19 2001

400 Seventh St., S.W.
Washington, D.C. 20590

RECEIVED
MAR 22 2001
LEGAL DEPARTMENT

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

RE:

Dear

This is in response to your letter dated in which you request confidential treatment for the enclosed documents and diskette. You assert that these materials contain compilations of production data for tires, and you request confidential treatment for these materials permanently.

You assert that the documents and diskette are being submitted voluntarily by to the National Highway Traffic Safety Administration (NHTSA), and that any disclosure of the information contained in these materials would cause to suffer substantial, and potentially irreparable, competitive harm. You assert also that has invested heavily in the development of technical information to enable it to compete effectively, and that has established and maintained protective measures to ensure such information is not disclosed to the public. You assert that disclosure of the information would competitively disadvantage vis-à-vis other tire manufacturers, who would use such information to sell against as well as to learn trade secrets. You assert further that the disclosure could potentially inhibit competition among tire manufacturers and that access by competitor tire manufacturers to the information could potentially reduce their incentives to competitively innovate and conduct independent research.

You also requested that NHTSA return all copies of the "confidential" information to upon the conclusion of NHTSA's consideration of information.

I have reviewed your submission, including the materials that you claim are entitled to confidential treatment and the arguments that you assert in support of your claim. While I have not reached a conclusion regarding each individual argument that you assert, I have concluded based upon your submission as a whole that the public release of these materials are likely to

cause substantial competitive harm to and, therefore, that these materials are entitled to confidential treatment pursuant to Exemption 4 of the Freedom of Information Act, 5 U.S.C. §552(b)(4).

Please note that the agency will not return these materials to upon the conclusion of its consideration of the information. The confidential information will be held confidential for an indefinite period of time.

This grant of confidential treatment is subject to certain conditions since the information for which confidentiality has been granted was submitted pursuant to a defect investigation. The information may be disclosed under the authority of 49 U.S.C. §30167(b) and 49 C.F.R. §512(a)(2), if the agency decides the disclosure will assist in carrying out the purposes of the National Traffic and Motor Vehicle Safety Act.

In addition, this material may be disclosed under 49 C.F.R. §512.8, based upon newly discovered or changed facts, and you must inform the agency of any changed circumstances which may affect the protection of the information (49 C.F.R. §512.4(i)). Prior to the release of information under 49 C.F.R. §512.8 or §512.9, you would be notified in accordance with the procedures established by our regulations.

Sincerely,

Heidi L. Coleman
Assistant Chief Counsel
for General Law

U.S. Department
of Transportation
**National Highway
Traffic Safety
Administration**

400 Seventh St., S.W.
Washington, D.C. 20590

FEB - 6 2001

RE:

Dear

This is in response to your letter dated in which you request confidential treatment on behalf of for information submitted to the National Highway Traffic Safety Administration (NHTSA) in a meeting on You state that this information contains compilations of litigation, claims and warranty data for tires. You request permanent confidential treatment for this information.

You assert that the information was submitted voluntarily by to NHTSA. You assert that the information is not available publicly. You assert also that the information has been gathered, assembled, formulated for analysis, and analyzed at your request and under your supervision and, accordingly, has been treated within as privileged and confidential/attorney work product. You assert that the disclosure of this information would cause to suffer serious, and potentially irreparable, competitive harm.

I have examined this information and have determined that this information was provided voluntarily and is not customarily disclosed to the public. Critical Mass Energy Project v. NRC, 975 F.2d 871, 878 (D.C. Cir. 1992); See also, Klayman & Gurley, P.C. v. U.S. Dep't of Commerce, No. 88-0783, slip op. at 4 (D.D.C. Apr. 17, 1990) (involving comments received in response to a Federal Register notice). Therefore, I have decided to grant this information confidential treatment under Exemption 4 of the Freedom of Information Act, 5 U.S.C. §552(b)(4). This information will be protected for an indefinite period of time. Since I have decided to grant protection to this information on this basis, I did not need to reach a decision regarding the application of the other bases cited in your request.

The information may be disclosed under 49 C.F.R. §512.8, based upon newly discovered or changed facts, and you must inform the agency of any changed circumstances that may affect the protection of the information (49 C.F.R. §512.4(i)). Prior to the release of information under 49 C.F.R. §512.8 or §512.9, you would be notified in accordance with the procedures established by our regulations.

Sincerely,

Heidi L. Coleman
Assistant Chief Counsel
for General Law

U.S. Department
of Transportation
**National Highway
Traffic Safety
Administration**

400 Seventh Street
Washington, D.C. 20590

REGISTERED MAIL - RETURN RECEIPT REQUESTED

AUG 20 1987

Re:

Dear

This is in response to your letter of , requesting confidentiality for information pertaining to tire registrations. Specifically, you requested that the figures which represent the number of tires sold, the number of tires registered and the percentages representing registrations of total sales be withheld from release to the public "permanently."

After carefully reviewing the information submitted, I have determined that your request should be granted in part and denied in part. NHTSA will grant your request with respect to those figures that represent the number of sales and registrations because the release of this information could cause substantial competitive harm to your company. Your request is denied, however, with respect to those figures which represent the number of registrations as a percentage of the sales.

Please inform NHTSA of any changed circumstances which may affect the necessity for confidential treatment of this information for which confidential protection has been given (49 C.F.R. 512.4(b)).

You may submit additional justification in support of your confidentiality request for that portion of the submission which has been denied protection. Any additional support must be received by this agency within ten days of your receipt of this letter, or the subject information will be cleared for public release.

Sincerely,

Kathleen DeMeter
Assistant Chief Counsel
for General Law

U.S. Department
of Transportation
**National Highway
Traffic Safety
Administration**

400 Seventh Street, S.W.
Washington, D.C. 20590

18 AUG 1986

Dear

This is in response to your letter of requesting that the information provided in response to Items IV.1.a., IV.1.b. and IV.2 be treated confidentially. As with previous requests, the National Highway Traffic Safety Administration will grant confidentiality to the figures which represent the number of tires sold and the number of tires registered, but may release the figures which represent the number of tires registered as a percentage of the tires sold. I will instruct agency personnel having access to this information to treat it accordingly.

Sincerely,

Kathleen DeMeter
Assistant Chief Counsel
for General Law

U.S. Department
of Transportation

**National Highway
Traffic Safety
Administration**

22 AUG 1985

CERTIFIED MAIL--RETURN RECIEPT REQUESTED

Dear

This is in response to your letter of requesting confidential treatment for tire registration information submitted pursuant to the [redacted]. As with previous submissions, the figures representing the number of sales/shipments and the number of registrations will be afforded confidentiality. However, the figures which represent the number of registrations as a percentage of the sales may be released upon request. It is my determination that the release of these percentages will not reveal the market share of a particular company and, therefore, will cause no substantial competitive injury.

If you disagree with this determination and wish to submit additional justification supporting a claim of confidentiality for the percentages, such justification must be received by this agency within ten days of your receipt of this letter. At such time as the Agency determines that it no longer has need for the information contained in your response to the Special Order, we will make arrangements with you concerning its return or disposal.

Sincerely,

Kathleen DeMeter
Assistant Chief Counsel
for General Law

U.S. Department
of Transportation

**National Highway
Traffic Safety
Administration**

400 Seventh Street, S.W.
Washington, D.C. 20590

AUG 10 1984

Dear

This is in response to your letter of requesting confidentiality for information pertaining to tire registrations. I will accord confidentiality to your responses to Items IV.1.a. and b., Items IV.2.a. and b. and Items IV.3.a and b. I will release the registration as a percentage of sales figures. As with previous requests, total confidentiality will be given to the names and addresses of dealers and distributors. Any figures representing the registrations as a percentage of the sales that may be released will not be related to any particular dealer. At such time as the agency no longer needs the submitted information, you will be notified and arrangements will be made for its return or disposal.

Sincerely,

Frank Berndt
Chief Counsel

U.S. Department
of Transportation

**National Highway
Traffic Safety
Administration**

400 Seventh Street, S.W.
Washington, D.C. 20590

FEB 16 1984

Dear

This is in response to your letter of , responding to the [redacted] issued by the National Highway Traffic Safety Administration that pertains to tire registrations. After reviewing your request for confidentiality, I have determined to treat the documents in the same manner as those submitted in response to the first Special Order. I will accord confidentiality to Items IV.1.a. and b., Items IV.2.a and b. and Items IV.3.a. and b. I will release the registration as a percentage of sales figures, as well as all other information contained in your letter.

As with your first request, total confidentiality will be given to the names and addresses of dealers and distributors and any figures representing the registrations as a percentage of the sales that may be released will not be related to any particular dealer. At such time as the agency no longer needs the submitted information, you will be notified and arrangements will be made for its return or disposal.

Sincerely

Frank Berndt
Chief Counsel

U.S. Department
of Transportation

**National Highway
Traffic Safety
Administration**

400 Seventh Street, S.W.
Washington, D.C. 20590

JAN 16 1984

Dear

This is in response to your letter of , concerning the confidentiality of certain information submitted by pertaining to tire registrations. Your understanding that dealers names and addresses will be given total confidentiality and that the figures representing the registrations as a percentage of the sales will not be related to any particular dealer is correct.

Sincerely,

Frank Berndt
Chief Counsel

U.S. Department
of Transportation

**National Highway
Traffic Safety
Administration**

400 Seventh Street, S.W.
Washington, D.C. 20590

January 10, 1984

Dear

On , the agency transmitted a to your company which requested tire registration and shipment data for the periods and . That , in the last paragraph of the cover letter, reduced the number of copies of data requested to two, from the five copies of confidential data requested in the , . We would further like to offer the option of providing the agency only one hard copy of the data on individual dealer registrations and shipments, plus one copy of the computer tape equivalent of those data. That tape, accompanied by an explanation of the format, would greatly aid the agency in data input.

Please contact of my staff, on (202) 426-1574, to let us know if it is possible to provide us a tape.

Sincerely,

Frank G. Ephraim
Director
Office of Program Evaluation

U.S. Department
of Transportation
**National Highway
Traffic Safety
Administration**

400 Seventh St., S.W.
Washington, D.C. 20590

NOV 29 2000

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

RE:

Dear

This is in response to your letter dated in which you request confidential treatment for information concerning "warranty return analysis for the and a descriptive summary of product improvements made to the Tires. You state that this information was presented voluntarily to the Office of Defects Investigation on You request confidential treatment for this information on a permanent basis.

You assert that disclosure of this information at any time would result in substantial competitive harm, allowing competitors access to sensitive business information. You assert also that the evaluation of production figures and warranty adjustment data would allow competitors of to determine market share, which is a significant and closely guarded trade secret in the tire industry. In addition, you assert that the public release of the submitted information would provide competitors with the ability to evaluate , without allowing a comparable opportunity to evaluate their counterpart data. You assert also that does not publish nor disseminate this type of information, and access within the company is limited to specific employees. Finally, you assert that the data submitted regarding the technical changes to the products could be exploited by competitors and would harm the goodwill of

I have examined this information and have determined that this information was provided voluntarily and is not customarily disclosed to the public. Critical Mass Energy Project v. NRC, 975 F.2d 871, 878 (D.C. Cir. 1992); See also, Klayman & Gurley, P.C. v. U.S. Dep't of Commerce, No. 88-0783, slip op. at 4 (D.D.C. Apr. 17, 1990) (involving comments received in response to a Federal Register notice). Therefore, I have decided to grant this information confidential treatment under Exemption 4 of the Freedom of Information Act, 5 U.S.C.

§552(b)(4). This information will be protected for an indefinite period of time. Since I have decided to grant protection to this information on this basis, I did not need to reach a decision regarding the application of the other bases cited in your request.

The information may be disclosed under 49 C.F.R. §512.8, based upon newly discovered or changed facts, and you must inform the agency of any changed circumstances that may affect the protection of the information (49 C.F.R. §512.4(i)). Prior to the release of information under 49 C.F.R. §512.8 or §512.9, you would be notified in accordance with the procedures established by our regulations.

Sincerely,

Heidi L. Coleman
Assistant Chief Counsel
for General Law

U.S. Department
of Transportation
**National Highway
Traffic Safety
Administration**

400 Seventh St., S.W.
Washington, D.C. 20590

APR 2 4 2001

CERTIFIED MAIL -RETURN RECEIPT REQUESTED

RE:

Dear

This is in response to your letter dated requesting confidential treatment on behalf of for portions of a letter dated March 16, 2001, to Kathleen DeMeter, Director of this agency's Office of Defects Investigation and Attachments B, C, D, E, F and G enclosed with your letter. Attachments B and C contain tire specifications, Attachment D contains photographs, and Attachments E, F and G contain test results. requests confidential treatment for this information for an unspecified period of time.

Please note that the agency's regulations governing confidential business information, 49 C.F.R. §512, requires that submitters of information claimed to be confidential must "stamp or mark [the word] 'confidential,' or some other term which clearly indicates the presence of information claimed to be confidential, on the top of each page containing information claimed to be confidential" (49 C.F.R. §512.4(a)(1)). The agency's regulations also require submitters of information to mark each item of information which is claimed to be confidential with brackets "[]" (49 C.F. R §512.4(a)(2)). Please comply with the agency's regulation in the future.

asserts that the basis for its request for confidential treatment is that information concerning testing parameters, including its design quality level, is highly proprietary and its disclosure would cause competitive harm. asserts also that target tire letter contains trade and manufacturing information which consider and treat as confidential. Finally, asserts that the disclosure of these materials would likely result in substantial competitive harm in that competitors would be able to discern certain design, manufacturing and testing

data that is not otherwise available and that might enable competitors to duplicate product. According to , such disclosure and duplication of product could greatly harm position in the tire industry.

I have reviewed your submission, including the materials that you claim are entitled to confidential treatment and the arguments that you assert in support of your claim. While I have not reached a conclusion regarding each individual argument that you assert, I have concluded based upon your submission as a whole that the public release of these materials is likely to cause substantial competitive harm to and, therefore, that these materials are entitled to confidential treatment pursuant to Exemption 4 of the Freedom of Information Act, 5 U.S.C. §552(b)(4).

This grant of confidential treatment is subject to certain conditions since the information for which confidentiality has been granted was submitted pursuant to a defect investigation. The information may be disclosed under the authority of 49 U.S.C. §30167(b) and 49 C.F.R. §512(a)(2), if the agency decides the disclosure will assist in carrying out the purposes of the National Traffic and Motor Vehicle Safety Act.

In addition, this material may be disclosed under 49 C.F.R. §512.8, based upon newly discovered or changed facts, and you must inform the agency of any changed circumstances which may affect the protection of the information (49 C.F.R. §512.4(i)). Prior to the release of information under 49 C.F.R. §512.8 or §512.9, you would be notified in accordance with the procedures established by our regulations.

Sincerely,

Heidi L. Coleman
Assistant Chief Counsel
for General Law

ATTACHMENT 3

19 of 19 DOCUMENTS

IN THE MATTER OF THE RUBBER MANUFACTURERS ASSOCIATION, INC., ET AL.

Docket 7505

Federal Trade Commission

60 F.T.C 89; 1962 FTC LEXIS 11

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Complaint, June 2, 1959

Jan. 6, 1962, Decision

SYLLABUS:

[*1]

Consent order requiring two trade associations and 15 manufacturers, accounting for substantially all the domestic production of rubber tires and tubes and with annual sales approximating two billion dollars, to cease engaging in a price-fixing conspiracy in the course of which they agreed upon and maintained a single zone delivered price system for tires and tubes - with the "Big Four" quoting identical prices to all customers of a class throughout the United States, and the others quoting prices lower by agreed-upon differentials - and engaged in other contributing illegal practices as in the order below indicated.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that the party respondents named in the caption hereof, and hereinafter more particularly designated and described, have violated and are now violating Section 5 of the Federal Trade Commission Act (U.S.C., Title 15, Sec. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, the Commission hereby issues its complaint, stating [*2] its charges as follows:

PARAGRAPH 1. Respondent The Rubber Manufacturers Association, Inc., hereinafter referred to as respondent RMA, is an incorporated trade association organized and existing under and by virtue of the laws of the State of Connecticut, with its principal office located at 444 Madison Avenue, New York, N.Y. Said trade association was originally organized in 1900. After undergoing changes in name and organizational structure, it was incorporated under the laws of the State of Connecticut in 1915, under the name "The Rubber Club of

America", which name was changed to "The Rubber Association of America, Inc." in 1917, and to its present corporate title in 1929.

Respondent The Tire and Rim Association, Inc., hereinafter referred to as respondent TRA, is an incorporated trade association organized and existing under and by virtue of the laws of the State of Ohio, with its principal office located at 2001 First National Tower, Akron, Ohio. Said trade association was originally organized in 1903 under a different name. After undergoing several changes in name and organizational structure, it was incorporated under its present corporate title in 1933.

Respondent [*3] The Goodyear Tire and Rubber Company, hereinafter referred to as respondent Goodyear, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 1144 East Market Street, Akron, Ohio.

Respondent The Firestone Tire and Rubber Company, hereinafter referred to as respondent Firestone, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 1200 Firestone Parkway, Akron, Ohio.

Respondent United States Rubber Company, hereinafter referred to as respondent U.S., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 1230 Avenue of the Americas, New York, N.Y.

Respondent The B. F. Goodrich Company, hereinafter referred to as respondent B. F. Goodrich, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 500 South Main Street, Akron, [*4] Ohio.

Respondent The General Tire and Rubber Company, hereinafter referred to as respondent General, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with is principal office and place of business located at 1708 Englewood Avenue, Akron, Ohio.

Respondent The Armstrong Rubber Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its principal office and place of business located at 475 Elm Street, West Haven, Conn. Said respondent was incorporated in 1940 as successor in interest to Armstrong Rubber Company, Inc., incorporated under the laws of the State of New Jersey in 1916.

Respondent Cooper Tire and Rubber Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at Lima and Western Avenues, Findlay, Ohio.

Respondent The Dayton Rubber Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 2342 Riverview [*5] Avenue, Dayton, Ohio.

Respondent Dunlop Tire and Rubber Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at River Road and Sheridan Drive, Buffalo, N.Y.

Respondent The Gates Rubber Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its principal office and place of business located at 999 South Broadway, Denver, Colo.

Respondent Lee Rubber and Tire Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at Conshohocken, Pa.

Respondent The Mansfield Tire and Rubber Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 515 Newman Street, Mansfield, Ohio.

Respondent McCreary Tire and Rubber Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal [*6] office and place of business located at Indiana, Pa.

Respondent The Mohawk Rubber Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 1325 Second Avenue, East Akron, Ohio.

Respondent Seiberling Rubber Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 345 15th Street, Northwest, Barberton, Ohio.

All of the respondents named herein, other than respondents RMA and TRA, are collectively referred to hereinafter as "respondent manufacturers". Each of said respondent manufacturers is a member or contributing nonmember, of respondents RMA and TRA, and has for a number of years, through such membership and otherwise, directly or indirectly, participated in the cooperative and collective action of all of those named herein as respondents in formulating, engaging in and making effective the methods, systems, acts, practices and policies which are alleged herein to be unlawful.

PAR. 2. Respondent manufacturers, either directly [*7] or indirectly through subsidiary or affiliated corporations or operating divisions, are engaged in the manufacture, sale and distribution of a great variety of rubber and associated products, including tires and inner tubes and items related thereto, hereinafter referred to as "tires and tubes", for use on automobiles, trucks, buses, tractors and other vehicles.

PAR. 3. Respondent RMA is a trade association whose membership is composed of manufacturers of tires and tubes and various other types of rubber products. Said respondent has been and now is engaged, through divisions, committees and other operating units, in a wide range of activities of mutual interest to its members, including standardization and simplification programs and the formulation and promotion of uniform accounting practices in the rubber industry. Respondent TRA is a trade association whose membership is composed of manufacturers of tires and tubes, rims, wheels, and their component parts. Said respondent "is the technical standardizing body of the tire and rim manufacturers of the United States", and has been and now is principally engaged, through committees and other operating units, in the formulation [*8]

and adoption of standardization and simplification programs for the mutual interests of its members. Respondent manufacturers are among the principal members of respondents RMA and TRA (except respondent The Gates Rubber Company, which is a contributing nonmember of respondent RMA) and actively participate in the management, operations, policies, discussions, meetings and programs thereof.

PAR. 4. Total sales of tires and tubes by domestic manufacturers thereof approximate two billion dollars annually, substantially all of which is accounted for by respondent manufacturers. To the extent that said respondent manufacturers act collectively or cooperatively in the pricing of tires and tubes, they are in a position to dominate and control the prices at which said products are sold by them to purchases in the original equipment and replacement markets. The latter includes independent dealers and distributors, federal, state and local government agencies and departments, and other classes of customers.

PAR. 5. The leading manufacturers of tires and tubes in the United States are respondents Goodyear, Firestone, U.S., and B. F. Goodrich. Said respondents collectively have been [*9] referred to in the industry for many years as the "Big Four", and are hereinafter so designated. The next leading manufacturer of said products for many years has been, and now is, respondent General. The Big Four and respondent General collectively have been referred to in the industry for many years as the "majors", and are hereinafter so designated. All other respondent manufacturers collectively have been, and now are, referred to in the industry as the "minors", and are hereinafter so designated.

PAR. 6. Respondent manufacturers produce tires and tubes in factories located in various parts of the United States, with many of said respondents having factories in more than one locality, from which points such products are transported, when sold or consigned, either directly or through numerous field warehouses or the company-owned stores of certain of said respondents, to their respective customers located throughout the United States. Among such customers are thousands of independent tire dealers or distributors who purchase tires and tubes from respondent manufacturers for resale at the wholesale level to automobile dealers, service stations, garages, fleet operators, and [*10] others, as well as for resale at the retail level. Respondent manufacturers also solicit business at the wholesale level from automobile dealers, service stations, garages, fleet operators, and others, and certain of said respondents have numerous stores located throughout the United States which resell tires and tubes at the wholesale level to the foregoing classes of customers, as well as at the retail level. Other important customer classes include the manufacturers of motor and other vehicles, who purchase tires and tubes primarily for use as original equipment on said vehicles; and federal, state and local governments, many of whom purchase tires and tubes on a sealed bid basis. The "majors" are the leading suppliers of tires and tubes to the original equipment market, although all respondent manufacturers solicit the business of, and sell tires and tubes to, purchasers in said market.

PAR. 7. Respondent manufacturers maintain, and at all times mentioned herein have maintained either directly or indirectly through subsidiary or affiliated corporations or operating divisions, a substantial and continuous course of trade in tires and tubes in commerce, as "commerce" is defined [*11] in the Federal Trade Commission Act, between and among the various states of the United States and the District of Columbia. Respondents RMA and TRA have been and now

are engaged in aiding respondent manufacturers in carrying out the unlawful methods, acts and practices as alleged herein, which directly and substantially have affected and now affect competition between and among said respondent manufacturers.

PAR. 8. Respondent manufacturers have been and now are in competition with each other, and with others, in the manufacture, sale and distribution of tires and tubes to purchasers thereof, except insofar as actual and potential competition has been hindered, lessened restricted, restrained, suppressed or eliminated by the unlawful and unfair methods, acts and practices hereinafter alleged.

PAR. 9. Respondent manufacturers, either directly or indirectly through subsidiary or affiliated corporations or operating divisions, acting between and among themselves and through and by means of respondents RMA and TRA, for many years last past and continuing to the present time, have maintained and now maintain and have in effect an understanding, agreement, combination and conspiracy [*12] to pursue, and they have pursued, a planned common course of action between and among themselves to adopt and adhere to certain practices and policies to hinder, lessen, restrict, restrain, suppress and eliminate competition in the manufacture, sale and distribution of tires and tubes in the course of the aforesaid commerce.

PAR. 10. Pursuant to and in furtherance of said understanding, agreement, combination, conspiracy and planned common course of action, respondent manufacturers, either directly or indirectly through subsidiary or affiliated corporations or operating divisions, acting between and among themselves and through and by means of respondents RMA and TRA, for many years last past and continuing to the present time, have engaged in and carried out by various methods and means the following acts, practices, methods, systems and policies, among others:

(1) Agreed to adopt, and have adopted, maintained and made effective, a system of delivered price quotations for tires and tubes, designed to prevent, and which does prevent, reflection in such quotations of any differences in cost of raw materials, factory overhead, depreciation or other items, as between respondent manufacturers, [*13] or any differences in the cost of delivery between the respective places of manufacture, or other shipping points, of said respondents to the respective locations of the purchasers or prospective purchasers of tires and tubes. Said system also prevents any advantage to many of said purchasers in delivered cost which would otherwise result because of their proximity to the places of production or shipping point, thereby discriminating against such purchasers.

(2) Agreed to adopt, and have adopted, maintained and made effective, a single zone delivered price system for tires and tubes whereby price offers made by all respondent manufacturers to all purchasers of a class throughout the United States, regardless of location and any differences in freight rates from shipping point to destination, are identically or substantially matched, except to the extent that by prearrangement and understanding the price offers made by respondent General and by each of respondent "minors" are permitted to be made and maintained at recognized differentials below the identically or substantially matched offers of the "Big Four" respondents.

(3) For many years prior to about November 1955, respondent [*14] manufacturers of industrial solid tires adopted, maintained and made effective a

system whereby the United States was divided into two zones, designated by certain of said respondents as East and West zones, which operated in the same manner and with the same effect within each zone, with a price differential between zones, as the single zone delivered price system set forth in subparagraph (2) above. Since about November 1955, industrial solid tires have been offered for sale and have been sold by said respondent manufacturers in the same manner and with the same effect as all other tires and tubes, as set forth in subparagraph (2) above.

(4) Beginning about 1923, respondent manufacturers, with the active participation and cooperation of respondent RMA, prepared and made effective a uniform system of accounting for the tire and tube industry. Said accounting system has been continually used, as revised from time to time, by respondent manufacturers since its inception. In or about 1933, a "Cost Accounting Formula for the Calculation of Rubber Product Costs for Establishment of Selling Prices", hereinafter referred to as "Cost Formula", was included in said system "as a vitally [*15] essential and integral part of the uniform cost accounting plan". Said "Cost Formula" was adopted and has been continued in effect since its inception by respondent manufacturers by agreement, understanding and concerted action between and among themselves for utilization, together with other price-fixing formulae, in calculating, fixing, establishing and maintaining identical or substantially identical delivered price quotations in the sale of tires and tubes, except to the extent that agreed upon recognized price differentials are permitted for respondent General and respondent "minors", as described in subparagraph (2) above.

(5)In furtherance of their utilization of the "Cost Formula" in the manner and for the purposes described in subparagraph (4) above, and since the inception thereof, respondent manufacturers have submitted confidential accounting data to respondent RMA for the determination by the latter of arbitrary and artificial pricing factors which it has disseminated to them and which have been and now are used by said respondent manfacturers in the establishment of selling prices for tires and tubes.

(6) Agreed to fix, adopt and maintain, and have fixed, adopted, [*16] maintained, and made effective, identical or substantially uniform customer classifications, list prices, trade discounts, promotional discounts, carload and truckload discounts, cumulative annual volume bonuses and allowances, transportation terms, other terms and conditions of sale, and all other factors affecting the selling prices of tires and tubes, all for the purpose and with the effect of either identically or substantially matching delivered price quotations, except to the extent that agreed upon recognized price differentials are permitted for respondent General and respondent "minors", as described in subparagraph (2) above.

(7) Agreed to adopt, and have adopted, maintained and continued in effect, at times through and by means of respondent RMA, uniform or substantially similar policies and terms of sale and delivery with respect to Spring (and Winter) Dating Plans, whereby tires and tubes are delivered to purchasers thereof during specified periods on a deferred payment basis.

(8) Respondent "majors" agreed to adopt, and have adopted, maintained and made effective, uniform policies and practices for special sales promotions of tires and tubes, including the types [*17] and sizes of said products featured during such promotions, the applicable terms and conditions of sale and

delivery, and the identical or substantially similar prices at which such tires and tubes are sold at retail by said respondent "majors" through their company-owned stores and other outlets. For example, such special sales promotions are conducted during certain National Holiday periods, generally at or about Decoration Day (May), July Fourth, and Labor Day (September).

(9) Agreed to fix and maintain, and have fixed, maintained and made effective, price-fixing formulae for calculating, determining and establishing identical or substantially similar prices for tires and tubes at which sales or offers of sale, by sealed bid or otherwise, have been and now are made or submitted by respondent manufacturers to federal and state, and certain county, city and other local, governmental agencies and departments, and to original equipment manufacturers, except to the extent that agreed upon recognized price differentials are permitted for respondent General and respondent "minors", as described in subparagraph (2) above.

(10) Respondent "majors" agreed to adopt, and have adopted, [*18] maintained and continued in effect, a system, method or plan for policing, controlling and enforcing adherence to identical or substantially similar prices, as set forth in Net State Price Lists, on sales, or offers of sale, by sealed bid or otherwise, of tires and tubes by said respondents, and their respective company-owned stores and independent dealers, to state, and certain county, city and other local, governmental agencies and departments.

(11) Agreed to adopt, and have adopted, maintained and continued in effect, a price leadership plan whereby one of the "Big Four" respondents generally leads in the announcement of tire and tube list price increases and decreases, as well as in the announcement of changes in all other factors or policies which affect the selling prices of said products, such as, but not limited to, discounts, bonuses and allowances, terms and conditions of sale and delivery, customer classifications, and Spring (and Winter) Dating Plans. Thereafter, respondent General and respondent "minors", by agreement, follow in the adoption and announcement of either identical or substantially similar prices or pricing factors or policies, except to the extent that [*19] agreed upon recognized price differentials are permitted for said respondents, as described in subparagraph (2) above.

(12) Respondent manufacturers have communicated between and among themselves and filed and exchanged with each other, through correspondence, telegraph, telephone and otherwise, confidential and other information concerning past, current and future prices and price quotations, terms and conditions of sale and delivery which have been and now are, or are to be, quoted and charged by said respondents to purchasers or prospective purchasers of tires and tubes. Through and by means of such acts, practices and methods, all respondent manufacturers keep informed and have a common understanding of the prices and pricing factors and policies expected to be, and which have been, used by each of them in the sale, or offering for sale, of tires and tubes.

(13) Respondent manufacturers, with the active cooperation and assistance, through meetings and otherwise, of respondent RMA and respondent TRA, have planned, adopted and made effective, simplification and standardization programs and policies for the purpose and with the effect of fixing, establishing and maintaining [*20] identical or substantially similar prices and price quotations, terms and conditions of sale and delivery and other factors affecting prices at which tires and tubes and related products, such as, but not

limited to, valves for tubeless tires, are sold or offered for sale by respondent manufacturers, except insofar as agreed upon recognized price differentials are permitted for respondent General and respondent "minors", as described in subparagraph (2) above.

(14) Respondent manufacturers have held and continue to hold meetings from time to time under the auspices and supervision of respondent RMA and of respondent TRA, during the course of which, and at other times, said trade associations have cooperated with and assisted, and continue to cooperate with and assist, said respondent manufacturers in furthering and carrying out the unlawful acts, practices and methods set forth herein.

PAR. 11. The inherent and necessary effects of the adoption and maintenance by respondent manufacturers of the zone delivered price systems of pricing and other acts, practices and methods set forth in paragraph 10 herein include the following, among others:

(1) The elimination of price competition [*21] between and among respondent manufacturers in the sale of tires and tubes;

(2) A substantial lessening of competition between and among respondent manufacturers in all parts of the United States by virtue of each of them voluntarily and reciprocally surrendering and cancelling the inherent advantage it has over other respondent manufacturers within the market area nearer freight-wise to its factory or factories than to a factory of another respondent manufacturer in consideration of a similar surrender and cancellation by each of said other respondent manufacturers;

(3) The fixing and using of certain arbitrary or average costs in determining selling prices of tires and tubes rather than any respondent manufacturer using its own such costs;

(4) The maintenance of monopolistic unfair and oppressive discrimination against purchasers of tires and tubes in large areas of the United States by depriving such purchasers of the advantage in cost otherwise accruing to them by reason of their proximity to the factories of respondent manufacturers, and by compelling such purchasers to pay portions of the cost of transportation of such products to other purchasers more distantly located from [*22] the respective factories of said respondents, all in the accomplishment of said respondents' unlawful purpose to destroy price competition in the sale of tires and tubes in commerce and to create for said respondents a monopoly therein and thereof.

PAR. 12. The combination and conspiracy and the acts, practices, methods, policies, agreements and understandings of the respondents as hereinbefore alleged, all and singularly, are unfair and to the prejudice of the public; deprive the public of the benefits of competition in the sale of tires and tubes; prevent price competition among respondent manufacturers in the sale of said products; deprive purchasers of said products of the benefits of competition in price; are discriminatory against some buyers and users of said products; maintain artificial and monopolistic methods and prices in the sale and distribution of said products; have a dangerous tendency and capacity to hinder, frustrate, suppress and eliminate, and have actually hindered, frustrated, suppressed and eliminated, competition in the sale of tires and tubes in commerce; have a dangerous tendency and capacity to restrain unreasonably, and have restrained unreasonably, [*23] commerce in said products; have a dangerous tendency and capacity to create in respondent

manufacturers a monopoly in the sale and distribution of such products; and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. James S. Kelaher, Sr., and *Mr. James P. Timony* supporting the complaint.

Alexander & Green, New York, N.Y., by *Mr. Edward E. Rigney* for respondent The Rubber Manufacturers Association, Inc.

Wise, Roetzel, Maxon, Kelly & Andress, Akron, O., by *Mr. John M. Ulman* for respondent The Tire and Rim Association, Inc.

Cahill, Gordon, Reindel & Ohl, New York, N.Y., by *Mathias F. Correa,* for respondent The Goodyear Tire & Rubber Company.

Gravelle, Whitlock, Markey & Tait, Washington, D.C., by *Mr. Thomas S. Markey* for respondent The Firestone Tire and Rubber Company.

Arthur, Dry & Dole, New York, N.Y., by *Mr. Myron Kalish,* for respondent United States Rubber Company.

White & Case, New York, N.Y., by *Mr. Edgar Barton* for respondent The B. F. Goodrich Company.

Sullivan & Cromwell, [*24] New York, N.Y., by *Mr. William E. Willis,* and *Mr. Frank W. Knowlton* and *Mr. John J. Dalton,* Akron, O., for respondent The General Tire & Rubber Company.

Thompson, Weir & Barclay, New Haven, Conn., by *Mr. John W. Barclay* for respondent The Armstrong Rubber Company.

Marshall, Melhorn, Bloch & Belt, Toledo, O., by *Mr. W. A. Belt,* for respondent Cooper Tire & Rubber Company.

Pickrel, Schaeffer & Ebeling, Dayton, O., by *Mr. James E. Corkey* and *Mr. William G. Pickrel,* and *Gravelle, Whitlock, Markey & Tait,* Washington, D.C., by *Mr. Thomas S. Markey* for respondent Dayco Corporation.

Phillips, Mahoney, Lytle, Yorkey & Letchworth, Buffalo, N.Y., by *Mr. Robert M. Hitchcock* for respondent Dunlop Tire and Rubber Corporation.

Mr. Dayton Denious, Denver, Colo., for respondent The Gates Rubber Company.

Satterlee, Browne, Cherbonnier & Dickerson, New York, N.Y., by *Mr. Paul Van Anda* for respondent Lee Rubber and Tire Corporation.

Baker, Hostetler & Patterson, Cleveland, O., by *Mr. Ezra K. Bryan* for respondent The Mansfield Tire and Rubber Company.

Reed, Smith, Shaw & McClay, Pittsburgh, [*25] Pa., by *Mr. Edmund K. Trent* for respondent McCreary Tire and Rubber Company.

Brouse, McDowell, May, Bierce & Wortman, Akron, O., by *Mr. C. Blake McDowell, Jr.,* for respondent The Mohawk Rubber Company.

Buckingham, Doolittle & Burroughs, Akron, O., by *Mr. Richard A. Chenoweth,* for respondent Seiberling Rubber Company.

ALJ: CREEL

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the respondents in this proceeding, charging that fifteen tire and tube manufacturers, accounting for substantially all of the industry's domestic production, and two trade associations had conspired to fix prices on tires and tubes.

On November 3, 1961, there was submitted to the hearing examiner an agreement between respondents, their counsel, and counsel supporting the complaint providing for the entry of a consent order.

Under the terms of the agreement, the respondents admit the jurisdictional facts alleged in the complaint. The parties agree, among other things, that the cease and desist order there set forth may be entered without further notice and have the same force and effect as if entered after a full hearing [*26] and the document includes a waiver by the respondents of all rights to challenge or contest the validity of the order issuing in accordance therewith. The agreement further recites that it is for settlement purposes only and does not constitute an admission by the respondents that they have violated the law as alleged in the complaint.

The hearing examiner finds that the content of the agreement meets all of the requirements of Section 3.25(b) of the Rules of the Commission, published May 6, 1955, as amended.

The hearing examiner having considered the agreement and proposed order, and being of the opinion that they provide an appropriate basis for settlement and disposition of this proceeding, the agreement is hereby accepted, and it is ordered that said agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission. The following jurisdictional findings are made and the following order issued:

1. Respondent The Rubber Manufacturers Association, Inc. (hereinafter sometimes referred to as RMA), is an incorporated trade association organized and existing under and by virtue of the laws of the State of Connecticut, [*27] with its principal office located at 444 Madison Avenue, New York, N.Y.

Respondent The Tire and Rim Association, Inc. (hereinafter sometimes referred to as TRA), is an incorporated association organized and existing under and by virtue of the laws of the State of Ohio, with its principal office located at 2001 First National Tower, Akron, Ohio.

Respondent The Goodyear Tire & Rubber Company, referred to in the complaint as The Goodyear Tire and Rubber Company, is an Ohio corporation with its principal office and place of business located at 1144 East Market Street, Akron, Ohio.

Respondent The Firestone Tire and Rubber Company is an Ohio corporation with its principal office and place of business located at 1200 Firestone Parkway, Akron, Ohio.

Respondent United States Rubber Company is a New Jersey corporation with its principal office and place of business located at 1230 Avenue of the Americas, New York, N.Y.

Respondent The B. F. Goodrich Company is a New York corporation (referred to in the complaint as an Ohio corporation) with its principal office and place of business located at 500 South Main Street, Akron, Ohio.

Respondent The General Tire & Rubber Company, referred [*28] to in the complaint as The General Tire and Rubber Company, is an Ohio corporation with its principal office and place of business located at 1708 Englewood Avenue, Akron, Ohio.

Respondent The Armstrong Rubber Company is a Connecticut corporation with its principal office and place of business located at 475 Elm Street, West Haven, Conn.

Respondent Cooper Tire & Rubber Company, referred to in the complaint as Cooper Tire and Rubber Company, is a Delaware corporation with its principal office and place of business located at Lima and Western Avenues, Findlay, Ohio.

Respondent Dayco Corporation, formerly known as and named in the complaint as The Dayton Rubber Company, is an Ohio corporation with its principal office and place of business presently located at 333 West First Street, Dayton, Ohio.

Respondent Dunlop Tire and Rubber Corporation is a New York corporation with its principal office and place of business located at River Road and Sheridan Drive, Buffalo, N.Y.

Respondent The Gates Rubber Company is a Colorado corporation with its principal office and place of business located at 999 South Broadway, Denver, Colo.

Respondent Lee Rubber and Tire Corporation is a New [*29] York corporation with its principal office and place of business located at Conshohocken, Pa.

Respondent The Mansfield Tire and Rubber Company is an Ohio corporation with its principal office and place of business located at 515 Newman Street, Mansfield, Ohio.

Respondent McCreary Tire and Rubber Company is a Pennsylvania corporation with its principal office and place of business located at Indiana, Pa.

Respondent The Mohawk Rubber Company, referred to in the complaint as The Mohawk Rubber Corporation, is an Ohio corporation with its principal office and place of business located at 1325 Second Avenue, Akron, Ohio.

Respondent Seiberling Rubber Company is a Delaware corporation with its principal office and place of business located at 345 15th Street, Northwest, Barberton, Ohio.

All of the respondents named herein, other than respondents RMA and TRA, are collectively sometimes referred to hereinafter as respondent manufacturers.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

A. *It is ordered,* That respondents, The Rubber Manufacturers Association, [*30] Inc., The Tire and Rim Association, Inc., The Goodyear Tire & Rubber Company, The Firestone Tire and Rubber Company, United States Rubber Company,

The B. F. Goodrich Company, The General Tire & Rubber Company, The Armstrong Rubber Company, Cooper Tire & Rubber Company, Dunlop Tire and Rubber Corporation, The Gates Rubber Company, Lee Rubber and Tire Corporation, The Mansfield Tire and Rubber Company, McCreary Tire and Rubber Company, The Mohawk Rubber Company, and Seiberling Rubber Company, their respective officers, representatives, agents, employees, subsidiaries, successors and assigns, directly or through any corporate or other device in or in connection with the manufacture, offering for sale, sale or distribution of rubber tires and tubes, tire valves, retread materials and repair materials (all of which products are hereinafter referred to as tires and tubes) in interstate commerce, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between or among any two or more of the said respondents, or between any one or more of said respondents and any [*31] others not parties hereto, to do or perform any of the following things:

1. Establish, fix or maintain prices, discounts, bonuses, allowances, terms or conditions of sale, or any other pricing policies or adhere to or follow any prices, discounts, bonuses, allowances, terms or conditions of sale, or any other pricing policies so established, fixed or maintained.

2. Quote, bid or sell at prices calculated or determined pursuant to or in accordance with a single zone delivered price system, or pursuant to or in accordance with any other plan or system of delivered prices.

3. Adopt, use or in any way follow any prices, discounts, bonuses, allowances, terms or conditions of sale, or any other pricing policies, announced by a particular respondent or respondents, or any of them, whereby prices, discounts, bonuses, allowances, terms or conditions of sale, or any other pricing policies are made identical or substantially uniform or matched, or reflect agreed upon price differentials.

4. Quote, bid or sell at prices calculated or determined in whole or in part through the use of a system of accounting or a cost formula.

5. Circulate or communicate cost data to respondent RMA [*32] or to any other trade association, business organization or non-governmental agency.

6. Establish, fix, maintain or adopt customer classifications, list prices, discounts, bonuses, warranties, guarantees, allowances, transportation terms, sales promotion plans (such as Labor Day sales or liquidation sales), payment plans (such as Spring Dating Plans), terms or conditions of sale, or any other pricing policies.

7. Quote, bid or sell to federal, state, county, or municipal governments, or any agencies thereof, or to original equipment manufacturers, at prices arrived at through any agreed upon formulae, or by any other agreed upon methods or means, whereby prices are made identical or substantially uniform or matched, or reflect agreed upon price differentials.

8. Establish or maintain a system, method or plan for policing, controlling, or enforcing adherence to any prices or pricing policies to any class of customers.

9. Exchange, distribute or circulate with, between or among respondents any information concerning prices, discounts, bonuses, allowances, terms or

conditions of sale, or any other pricing policies before announcement thereof to respondent's customers or the [*33] public.

10. Plan, adopt or make effective, through respondent RMA, or any other trade association or business organization, or through respondent TRA, or through any other non-governmental agency, any standardization or simplification programs or policies for the purposes of fixing, maintaining or tampering with prices or pricing policies.

11. Establish, fix, maintain, adopt or suggest any resale price to be maintained by any dealer; or police, control or enforce adherence to any resale price.

12. Allocate or designate the business of a specific purchaser, governmental or other, to or for a particular respondent or respondents.

13. Use or maintain respondent RMA or respondent TRA or any other agency as an instrument or medium for promoting, aiding, or rendering more effective, any cooperative or concerted effort or efforts to suppress or eliminate competition by or through any of the means or methods set forth in this order.

B. It is understood that nothing contained in the foregoing or Paragraph III hereof shall prevent any respondent manufacturer from negotiating or carrying out in good faith a contract to manufacture, or to sell to or buy from any bona fide customer [*34] or supplier, whether such customer or supplier is or is not a respondent herein.

II

It is further ordered, That each manufacturing respondent, and subsidiary thereof, shall, within ninety (90) days after the date of service of this Order, individually and independently revise its prices and pricing factors and policies on tires and tubes in the following manner:

A. Independently review its prices, price lists, discounts, bonuses and allowances, and other pricing factors and policies, on the basis of its own costs, the margin of profit individually desired, and other lawful considerations including outstanding contractual commitments;

B. Withdraw its presently effective prices, price lists, discounts, bonuses and allowances;

C. Establish new prices, price lists, discounts, bonuses and allowances on the basis of such an independent review;

D. In the event any prices, price lists, discounts, bonuses or allowances thus established are changed within the period of six (6) months following their adoption, the respondent making such change shall have the burden of establishing that such change was made in good faith to meet a competitive pricing situation. For a period of [*35] two years following the adoption of the prices, price lists, discounts, bonuses or allowances provided for in subparagraph C hereof, any respondent who has made changes therein during the above-noted sixmonth period shall have the burden of documenting all evidence relied upon in making such change and retaining and making available to the Commission upon request all such documentation; and

E. Within the hundred and twenty (120) days after the date of service of this Order, file with the Commission an affidavit setting forth the fact and manner of compliance with subparagraph C hereof.

III

It is further ordered, That each of the respondents, its officers, representatives, agents, employees, subsidiaries, successors and assigns, directly or through any corporate or other device, in connection with the sale of tires and tubes in interstate commerce, do forthwith cease and desist from:

A. Disseminating any information or data as to prices, discounts, bonuses, allowances, terms or conditions of sale, or any other pricing policies to any other of the respondents before announcement thereof to respondent's customers or to the public.

B. Attending any meeting with another respondent [*36] or respondents at which prices, discounts, bonuses, allowances, terms or conditions of sale, or any other pricing policies are discussed or considered.

IV

It is further ordered, That respondent The Rubber Manufacturers Association, Inc., its officers, representatives, agents, employees, subsidiaries, successors and assigns, directly or through any divisions, committees or other operating units or devices, formally or informally, in connection with the manufacture, offering for sale, sale or distribution of tires and tubes, do forthwith cease and desist and permanently refrain from planning or performing any of the following things:

A. Obtaining or disseminating any information as to prices, discounts, bonuses, allowances, warranties, guarantees, sales promotion plans (such as Labor Day sales or liquidation sales), payment plans (such as Spring Dating plans), terms or conditions of sale, or customer classifications in connection therewith, or any other pricing policies.

B. Conducting or holding any meeting at which discussion is had or consideration is given concerning information as to prices, discounts, bonuses, allowances, warranties, guarantees, sales promotion plans [*37] (such as Labor Day sales), payment plans (such as Spring Dating plans), terms or conditions of sale, or customer classification in connection therewith, or any other pricing policies.

C. Obtaining, compiling, retaining or disseminating any uniform accounting manuals or any cost data relating to accounting practices or procedures, including but not limited to cost accounting data, cost accounting surveys, cost formulae, or any accounting data relating to prices.

D. Cooperating in the formulation of any standardization or simplification programs or policies with the purpose of fixing, maintaining or tampering with prices or pricing policies.

E. Obtaining or collecting any information on nonpublic freight rates or transportation charges from any tire and tube manufacturer, or disseminating any information on any fictitious or averaged freight rates, or any zone pricing plan or system.

F. Acting as an instrument or medium for promoting, aiding or rendering more effective any cooperative or concerted effort to suppress or eliminate competition, or to cooperate with any of the other respondents herein in carrying out any of the acts prohibited by this Order.

V

It is [*38] *further ordered,* That respondent The Tire and Rim Association, Inc., its officers, representatives, agents, employees, subsidiaries, a successors and assigns, directly or through any divisions, committees, or other operating units or devices, formally or informally, in connection with the manufacture, offering for sale, sale or distribution of tires and tubes, do forthwith cease and desist and permanently refrain from planning or performing any of the following things:

A. Cooperating in the formulation of any standardization or simplification programs or policies with the purpose of fixing, maintaining or tampering with prices or pricing policies.

B. Acting as an instrument or medium for the purpose of promoting, aiding or rendering more effective any cooperative or concerted effort to suppress or eliminate competition, or to cooperate with any of the other respondents herein in carrying out any of the acts prohibited by this Order.

VI

VI

It is further ordered, That the complaint be, and it is hereby, dismissed as to respondent Dayco Corporation (formerly operating as The Dayton Rubber Company).

VII

It is further ordered, That each of the respondents shall [*39] within sixty (60) days after service upon it of this order file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with Paragraphs I, III, IV and V of this Order to cease and desist.

ORDER:

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, published May 6, 1955, as amended, the initial decision of the hearing examiner shall, on the 6th day of January 1962, become the decision of the Commission; and, accordingly:

It is therefore ordered, That respondents shall, within the times provided for in the order contained in the initial decision herein, file with the Commission reports, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

FTC-ACTION, TRADE-REGULATION ¶23,868, Rubber Manufacturers Assn., Inc., et al.--Order reopening and setting aside order as to Rubber Manufacturers Assn., Inc., Dkts. 5448 and 7505, July 19, 1995.

Rubber Manufacturers Assn., Inc., et al.--Order reopening and setting aside order as to Rubber Manufacturers Assn., Inc., Dkts. 5448 and 7505, July 19, 1995.

The FTC has terminated two consent orders against the Rubber Manufacturers Association, Inc. The orders--one entered in 1948 and one entered in 1962--followed charges that the Association and numerous members engaged in price-fixing. The Commission terminated the orders in accordance with its "sunsetting" policy, under which the Commission presumes that the public interest requires terminating competition orders more than 20 years old.

The orders prohibited the Association from, among other things, formulating or enforcing resale price agreements, exchanging price information or entering into price-fixing agreements.

In April, the Association petitioned the Commission to terminate the orders. The Commission vote to terminate them was 5-0, with Commissioner Mary L. Azcuenaga issuing a concurring statement.

In her statement, Commissioner Azcuenga said that although she concurs in the decision to grant the request to set aside the orders against RMAI, she dissents from the decision to limit the setting aside of the order to the association, instead of setting aside the order in its entirety. According to Azcuenaga, the decision to grant the relief to RMAI and deny it to the other respondents appears to be inconsistent with the Commission's announced Sunset Policy where it is presumed "that the public interest requires reopening and setting aside the order in its entirety. . .when a petition to reopen and modify a competition order is filed" and the order is more than 20 years old. The "burden on public and private resources" is increased "by applying the presumption in favor of sunset not only on a case-by-case basis but on a respondent-by-respondent basis," Azcuenaga concluded.

The respondents also agree not to represent that the Folger product is composed of coffees exclusively from Central America; that it possesses an inherent superiority over other coffees approximately commensurate in price which warrants the characterization of these other coffees as ordinary or common or as requiring the use of larger quantities to make each cup; or that most of the coffees sold in the United States are low-land grown. It is provided, however, that this agreement shall not prevent truthful characterization by each respondent of its coffee as mountain grown.

Orders released February 3, 1948.

See complaint, ¶ 12,243, and annotations, Vol. 2, ¶ 6620.233.

PRICE FIXING

[¶ 13,687] The Rubber Manufacturers Ass'n, Inc., Heel & Sole Division, and George Flint; Rubber Heel & Sole Manufacturers Ass'n and R. S. Crawford; Connecticut Leather & Findings Ass'n, Inc. and Harry Diamond.—Order to cease and desist, FTC Dkt. 5448.

Twenty-five manufacturers of rubber heels, rubber soles and accessory products and two trade associations have been ordered by the Commission to cease and desist from a nationwide combination and conspiracy to fix and maintain prices for their products.

The order is directed against the Rubber Manufacturers Association, Inc., New York, together with George Flint, chairman, and 12 manufacturer-members of its Heel & Sole Division; Rubber Heel & Sole Manufacturers Association, New York, as well as its 16 members; and Cat's Paw Rubber Co., Inc., Baltimore. Four of the members of the Rubber Manufacturers Association are also members of the Rubber Heel & Sole Manufacturers Association.

Under the order, the respondents are prohibited from engaging in or carrying out any combination, conspiracy or planned common course of action to establish, fix or maintain prices, terms or conditions of sale, or to adhere to any prices, terms or conditions of sale so fixed or maintained. They are also forbidden to collusively exchange, directly or through any central agency, publication or other medium, price information showing current or future prices or conditions of sale of any respondent manufacturer.

Another practice prohibited by the order is conspiracy or combination to formulate, use or enforce any resale price agreement relating to the resale of rubber heels, rubber soles or accessory products.

It is provided, however, that nothing in the order shall be construed to prohibit any of the respondents from entering into resale price maintenance contracts or agreements permitted under the Miller-Tydings Act.

A further proviso is to the effect that the order shall not be construed as prohibiting any seller from entering into agreements with any of its customers to sell its products at any price, or upon any terms and conditions of sale, independently determined and offered and independently accepted by either seller or buyer in any bona fide transaction when such agreements are not intended to and do not restrain trade or price competition.

The order is based on findings that in violation of the Federal Trade Commission Act, the respondent manufacturers, through the two associations and otherwise, have engaged in a combination to suppress and eliminate price and other competition among themselves and among the jobbers of their products, each adopting and utilizing one or more of the following practices:

Agreements on prices and terms and conditions of sale; agreements on the standards of quality to which such price agreements should be applied; and agreements between the manufacturers and their jobber customers on the resale prices to be charged by the jobbers.

The terms and conditions of sale and the standards of quality agreed upon either have been continued or have been supplemented so as to form the foundation for subsequent agreements of similar nature as to original and resale prices, the Commission found. Other findings are in substance as follows:

The respondent manufacturers also sought to prevent competition among themselves by systematically interchanging their price lists and undertaking to make changes in them only after notice to one another.

The associations and their officers undertook by combination, agreement and planned common course of action to fix uniform prices for the products of their member manufacturers when sold to jobbers and also to fix uniform prices at which the jobbers would sell to shoe repair men.

These uniform resale prices were fixed for various sections and areas comprising the entire country as the result of collaboration and cooperation with the jobbers, which was made effective by means of contracts entered into by some of the respondent manufacturers with their jobbers.

The respondent's collusive agreements and practices were found to have the following tendencies and effects in the interstate sale of rubber heels, rubber soles and accessory products:

Suppression of competion.

Unreasonable restraint of trade.

Fixing of original prices and maintenance of uniform resale prices and uniform standards of quality.

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Creation of monopoly.

The order is directed against four manufacturers as members of both respondent trade associations. They are Avon Sole Co., Avon, Mass.; Alfred Hale Rubber Co., North Quincy, Mass.; The Holtite Manufacturing Co., Baltimore; and Panther-Panco Rubber Co., Chelsea, Mass.

Other respondent members of The Rubber Manufacturers Association, Inc., are Auburn Rubber Corp., Auburn, Ind.; Dryden Rubber Co., Chicago; Essex Rubber Co., Trenton, N. J.; Goodyear Tire & Rubber Co. and Seiberling Rubber Co., both of Akron; The I. T. S. Co., Elyria, Ohio; and the United States Rubber Co. and the B. F. Goodrich Co., both of New York.

Other members of Rubber Heel & Sole Manufacturers Association are The Bearfoot Sole Co., Inc., Barberton, Ohio; Bradstone Rubber Co., Woodbine, N. J.; The Hagerstown Rubber Co., Hagerstown, Md.; Hanover Rubber Co., West Hanover, Mass.; Lynch Heel Co., Chelsea, Mass., The Monarch Rubber Co., Inc., Baltimore; The Norwalk Tire and Rubber Co., Norwalk, Conn., Plymouth Rubber Co., Inc., Canton, Mass.; Quabaug Rubber Co., North Brookfield, Mass.; Travelite Rubber Co., Inc., Boston; Victor Products Corp., Gettysburg, Pa.; and Webster Rubber Co., Auburn, Maine.

Dismissal of the complaint was ordered as to Beebe Brothers Rubber Co., Nashua, N. H., which was not found to have participated in the conspiracy; R. S. Crawford, who before his death was general director of Rubber Heel & Sole Manufacturers Association; and two corporations which have been dissolved, Hood Rubber Co., Watertown, Mass., and The O'Sullivan Rubber Co., Inc., Winchester, Va.

The complaint was also dismissed as to Connecticut Leather & Findings Association, Inc., Waterbury, Conn.; Harry Diamond, its secretary; and its 8 jobber-members. The dismissal was without prejudice to the right of the Commission to issue a new complaint against them or to take such other action as may be deemed proper. The complaint was dismissed as to these respondents, the Commission said, in order to expedite the disposition of the case against the respondent manufacturers and their trade associations, which entered into a stipulation as to the facts and waived further hearing and all intervening procedure.

It will be in the public interest, the Commission added, for the charges against these parties to be stated and determined in a separate proceeding.

Order issued February 2, 1948; released February 15, 1948.

See complaint, ¶ 13,439, and annotations, Vol. 2, ¶ 6380.63, 7084.

PRICE FIXING

[¶ 13,688] **Connecticut Leather & Findings Ass'n, Inc.; Bridgeport Leather Co., The Zich Leather Co.; Greenberg, d. b. a. Connecticut Leather Co.; Diamond Leather Co., New Haven Leather Co., Louis Geghter, d. b. a. Elm City Leather Co.; Puzzo Brothers Co.; Rochina DeCroce and Anthony M. DeCroce, d. b. a. Torrington Leather Co.**—New complaint, FTC Dkt. 5527.

Charge: After serving 25 manufacturers of rubber heels, rubber soles and accessory products with an order to cease and desist from a nation-wide price-fixing conspiracy, the Commission moved against a related combination among jobbers to fix and maintain prices of the products at both the wholesale and retail levels.

Eight Connecticut jobbers and their trade association are named respondents in a complaint charging restraint of trade in violation of the Federal Trade Commission Act. They are Connecticut Leather & Findings Association, Inc., Waterbury; its secretary, Harry Diamond, New Haven; Bridgeport Leather Co., Bridgeport; The Zich Leather Co. and Maurice Greenberg, trading as Connecticut Leather Co., both of Hartford; Diamond Leather Co., New Haven Leather Co. and Louis Geghter, trading as Elm City Leather Co., all of New Haven; Puzzo Brothers Co., Waterbury; and Rochina DeCroce and Anthony M. DeCroce, copartners trading as Torrington Leather Co., Torrington. The association members are engaged in selling and distributing rubber heels, rubber soles and accessory products in Connecticut and nearby States.

Although the Connecticut association and its members are the only respondents specifically named, the complaint alleges that they not only conspired with one another but also with various manufacturers and with other jobbers and distributors "to suppress and eliminate competition as to price and otherwise * * *."

As described in the complaint, the alleged conspiracy was designed to insure uniformity in the prices charged by the respondents and other jobbers as well as in the resale prices charged by their retailer-customers in transactions with ultimate purchasers.

Price uniformity among the jobbers was accomplished through use, among other things, of uniform schedules to be used in price calculations, the complaint alleges. It adds that enforcement of price uniformity, among both jobbers and retailers, was also effected by means of contracts, warnings, threats and injunctions.

In addition, the complaint avers, the respondents and other jobbers, through their trade associations and otherwise, took con-